HANDBOOK

OF

CRIMINAL LAW

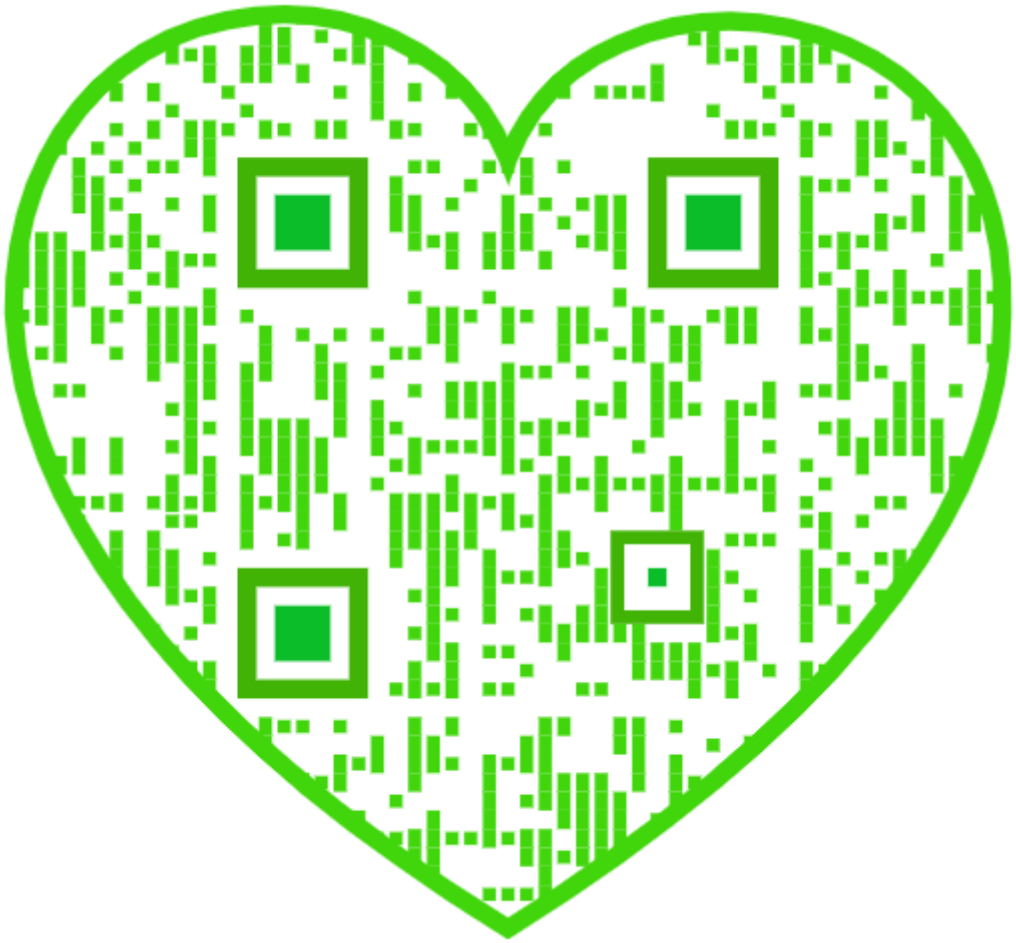
BY WM. L. CLARK, JR.

THIRD EDITION

BY WILLIAM E. MIKELL, B.S., LL.M.

PROFESSOR OF LAW IN THE UNIVERSITY
OF PENNSYLVANIA

ST. PAUL, MINN.
WEST PUBLISHING CO.
1915



L17590

JUL 3 0 1940

COPYRIGHT, 1894,
BY
WEST PUBLISHING CO.

COPYRIGHT, 1902,
BY
WEST PUBLISHING CO.

COPYRIGHT, 1915,
BY
WEST PUBLISHING CO.

(CLARK CR.L.3D ED.)

STANFORD LIBRARY

PREFACE TO THIRD EDITION

IN THE preface to the first edition of Clark's Criminal Law the author stated that the book was intended to present a concise, but full, statement of the general principles of the criminal law. In preparing this, the third edition, the editor has pursued the same object. The distinguishing method of treatment followed in the Hornbook Series has likewise been retained. The text of the first and second editions has been to a not inconsiderable extent revised and added to wherever such revision or addition seemed necessary or expedient. All important cases decided since the second edition was published have been studied, and the results incorporated either in the text or notes.

W. E. M.

CASTINE, MAINE, July 20, 1915.

PREFACE TO SECOND EDITION

IN PREPARING a new edition of Mr. Clark's book, no departure from the original plan of the author has been made. The book is intended, as explained in the preface to the first edition, to contain a concise, but full, statement of the general principles of the criminal law, exclusive of criminal procedure, which has been made the subject of a separate volume in the Hornbook Series by the same author. The editor has incorporated much new matter, which has necessitated changes in the original text, and has made other changes which were suggested to him by a use of the book in the classroom. Many additional cases, most of them reported since the first edition, but some of them earlier leading cases, have been cited.

F. B. T.

ST. PAUL, June 4, 1902.

TABLE OF CONTENTS

CHAPTER I

DEFINITION AND NATURE OF CRIME

Section		Page
1.	Definition of Crime	1
2.	Nature of Crime	2-18

CHAPTER II

THE CRIMINAL LAW—HOW PRESCRIBED

3.	How the Criminal Law is Prescribed	19
4.	The Common Law	19-26
5-6.	Statutes	27-40

CHAPTER III

CLASSIFICATION OF CRIMES

7.	How Classified	41
8.	Treason	41-42
9-10.	Felonies and Misdemeanors	42-44
11-12.	Merger of Offenses	45-47

CHAPTER IV

THE MENTAL ELEMENT IN CRIME

13.	Criminal Intent	48-50
14.	Motive Not Intent	50-52
15.	General Intent—Intent Presumed from Act	52-53
16.	Specific Intent	54-55
17-18.	Constructive Intent	56-59
19.	Intent in Cases of Negligence	59
20.	Concurrence of Act and Intent	60

CHAPTER V

PERSONS CAPABLE OF COMMITTING CRIME, AND EXEMPTIONS FROM RESPONSIBILITY

Section		Page
21–22.	Infancy	61–64
23–27.	Insanity	64–75
28–29.	Drunkenness	76–82
30–32.	Corporations	82–87
33–34.	Ignorance or Mistake of Law	87–90
35.	Ignorance or Mistake of Fact—Common-Law Offenses	90
36.	Same—Statutory Offenses	90–97
37.	Accident or Misfortune	97–98
38.	Justification	98–99
39.	Same—Duress	99–102
40.	Same—Coercion—Married Women	102–104
41.	Same—Necessity	104–107
42.	Provocation	107

CHAPTER VI

PARTIES CONCERNED IN THE COMMISSION OF CRIMES

43.	Effect of Joining in Criminal Purpose	108–109
44–45.	Principals and Accessaries	109–110
46.	Principals in the First Degree	110–112
47.	Principals in the Second Degree	112–119
48.	Accessaries before the Fact	119–124
49.	Accessaries after the Fact	124–127
50–51.	Use of Terms "Aider and Abettor" and "Accomplice"	127–128
52.	Principal's Liability for Acts of Agent	128–135
53.	Agent's Liability for His Own Acts	136–137

CHAPTER VII

THE OVERT ACT—ATTEMPTS, SOLICITATIONS, AND CONSPIRACY

54.	Necessity for Overt Act	138
55–56.	Attempts	138–151
57.	Solicitation	152–153
58–60.	Conspiracy	154–165

CHAPTER VIII

OFFENSES AGAINST THE PERSON

Section		Page
61–62.	Homicide in General	166–172
63–64.	Distinction between Justifiable and Excusable Homicide	173
65.	Justifiable Homicide	173–191
66.	Excusable Homicide in General	192
67.	Accident	192–194
68.	Excusable Self-Defense	194–205
69.	Felonious Homicide in General	205
70.	Murder	206
71–72.	Malice Aforethought	206–218
73–74.	Manslaughter in General	218
75.	Voluntary Manslaughter	218–229
76.	Involuntary Manslaughter	229–239

CHAPTER IX

OFFENSES AGAINST THE PERSON (Continued)

77–78.	Mayhem	240–242
79–80.	Rape	242–252
81–83.	Assault and Battery	252–277
84.	False Imprisonment	278–279
85.	Kidnapping	280–282
86–87.	Abduction	282–286

CHAPTER X

OFFENSES AGAINST THE HABITATION

88–90.	Arson	287–293
91–93.	Burglary	294–304

CHAPTER XI

OFFENSES AGAINST PROPERTY

94–98.	Larceny	305–351
99–100.	Embezzlement	351–360
101–102.	Cheating at Common Law	360–362
103–104.	Cheating by False Pretenses	362–372
105–107.	Robbery	373–377

Section		Page
108–109.	Receiving Stolen Goods	378–382
110.	Malicious Mischief	382–385
111–113.	Forgery	385–395
114.	Uttering Forged Instrument	396–397

CHAPTER XII

OFFENSES AGAINST THE PUBLIC HEALTH, SAFETY, COMFORT, AND MORALS

115.	Nuisance in General	398–406
116–117.	Bigamy or Polygamy	406–410
118–119.	Adultery	410–415
120–121.	Fornication	415–416
122.	Lewdness and Illicit Cohabitation	416–417
123.	Incest	418–419
124.	Miscegenation	420
125–127.	Sodomy, Bestiality, and Buggery	420–422
128.	Seduction	423–428
129–131.	Abortion	428–431

CHAPTER XIII

OFFENSES AGAINST PUBLIC JUSTICE AND AUTHORITY

132–134.	Common Barratry, Maintenance, and Champerty	432–434
135.	Obstructing Justice	435–436
136.	Embracery	436–437
137–139.	Escape, Prison Breach, and Rescue	437–439
140.	Misprision of Felony	440
141.	Compounding Crime	440–441
142–143.	Perjury and Subornation of Perjury	441–447
144.	Bribery	447–449
145–147.	Misconduct in Office	450–452

CHAPTER XIV

OFFENSES AGAINST THE PUBLIC PEACE

148.	In General	453–454
149.	Dueling	455
150–152.	Unlawful Assembly, Rout, and Riot	455–458
153.	Affray	458–461
154–155.	Forcible Entry and Detainer	461–462
156–157.	Libels on Private Persons	462–468

CHAPTER XV

OFFENSES AGAINST THE GOVERNMENT

Section		Page
158–160.	Treason and Misprision of Treason	469–474

CHAPTER XVI

OFFENSES AGAINST THE LAW OF NATIONS

161.	Piracy	475–476

CHAPTER XVII

JURISDICTION

162–164.	Territorial Limits of States and United States	477–480
165–168.	Jurisdiction as Determined by Locality of Offense	480–491
169–170.	Federal Courts and the Common Law	491–493
171.	Jurisdiction Conferred on Federal Courts by Congress	493–495
172–173.	Persons Subject to Our Laws	495–496

CHAPTER XVIII

FORMER JEOPARDY

174.	In General	497–503

TABLE OF CASES CITED

(Page 505)

INDEX

(Page 549)

HANDBOOK
OF
CRIMINAL LAW

THIRD EDITION

CHAPTER I

DEFINITION AND NATURE OF CRIME

1. Definition of Crime.
2. Nature of Crime.

DEFINITION OF CRIME [1]

1. A crime may be generally defined as the commission or omission of an act which the law forbids or commands under pain of a punishment to be imposed by the state in a proceeding in its own name.

[1] The following are some of the definitions given in the books:

"An act committed or omitted in violation of a public law either forbidding or commanding it." 4 Bl. Comm. 5.

"A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bish. New Cr. Law, § 32.

Mr. Wharton does not define crime, unless a marginal note may be taken as a definition. This is that "crime is an act made punishable by law." In his text he says that, "at common law, a wrong which public policy requires to be prosecuted by the state is an indictable offense." 1 Whart. Cr. Law, § 14.

"The difference between crimes and civil injuries is not to be sought in a supposed difference between their tendencies, but in the differ-

NATURE OF CRIME

2. Crimes are prohibited and punished on the ground of public policy, to prevent injury to the public, and not to redress the wrong done to individuals, and therefore—

(a) A civil action by the person particularly injured by a criminal act does not bar a criminal prosecution by the state for the same act, nor does a criminal prosecution bar a civil action.

(b) Condonation of a crime by the individual injured is no bar to a criminal prosecution, except in case of certain wrongs not of serious injury to the public.

(c) Whether consent to the injury by the person particularly injured is a defense depends upon the circumstances:

(1) A person cannot consent to being killed or seriously injured.

(2) Nor can he consent to a breach of the public peace, or to public immorality.

(3) He may consent to an assault and battery which does not seriously injure him nor disturb the public peace.

(4) Want of consent is an essential ingredient of some crimes, in which case consent is a defense.

ence between the mode wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party, or his representative, is a civil injury. An offense which is pursued by the sovereign, or by a subordinate of the sovereign, is a crime." Aust. Jur. § 17.

In some of the states the term "crime" is defined by statute. Pen. Code 1889 N. Y. § 3; Pen. Code Minn. § 3; Pen. Code Cal. § 15; and probably in other states.

(5) The consent must in all cases be voluntary, must not have been induced by fraud, and the person consenting must be mentally competent.

(6) Ordinarily, it is immaterial that the offender was entrapped into committing the crime.

(d) As a rule, the fact that the person particularly injured was also in the wrong is immaterial.

Prohibition by Law is Essential

Acts may be prohibited either by a statute, or by a body of the law known as the "unwritten" or "common" law.[2] Prohibition by one or the other is essential. It is often loosely said that such and such an act is a crime, and that there ought to be a law against it, but an act is not a crime merely because it is wrong. It is not prohibited because it is a crime. It is prohibited because of its wrongful nature and injurious effect, and the fact of prohibition, together with the other considerations mentioned in the definition, makes it a crime. In the absence of prohibition by the law, no act is a crime, however wrong it may seem to the individual conscience. Thus it has been decided that the federal court could not punish one who procured another to commit murder, in the absence of an act of Congress making such procuring a crime, although as said by the court, the person who instigates another to commit murder is frequently guilty of a greater moral wrong than the one who strikes the fatal blow.[3] Furthermore, the law which prohibits the crime must be in force, not only when the act is committed, but when it is punished. If the law ceases to be operative by its own limitation or by a repeal before judgment is pronounced, the accused cannot be pun-

[2] Post, pp. 19–26.

[3] U. S. v. Ramsay, Hempst. 481, Fed. Cas. No. 16,115.

ished for its infraction, even though it was in force when he did the act forbidden by it and when he was convicted therefor. Hence it is usual in every repealing law to insert a saving clause continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed.[4]

Public Policy the Ground of Punishment.

The ground upon which certain acts are declared crimes and punished, while others which may seem to some equally wrong are not, is, or should be, public policy or the public good. This is the foundation of the criminal law. Where an act has a tendency to injure the public, it is the duty of the state, as the representative of the public, to take such steps as may be necessary to prevent it. It is for this reason that the state inflicts punishment, the primary object being to deter. Retributive justice does not of itself warrant infliction of punishment, but where the public good makes punishment necessary as an example to deter, the offender's desert of punishment justifies its infliction on him.[5] Aside from the consideration of public policy, the state would have no right whatever to punish any man; and the common law does not undertake to do so.[6]

The ground of punishment is not, however, an essential part of the definition of a crime. The elements essential to

[4] U. S. v. Irvine, 98 U. S. 450, 25 L. Ed. 193; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; State v. Ingersoll, 17 Wis. 631; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Com. v. Duane, 1 Bin. (Pa.) 601, 2 Am. Dec. 497; State v. Williams, 97 N. C. 455, 2 S. E. 55; Wheeler v. State, 64 Miss. 462, 1 South. 632; STATE v. MANSEL, 52 S. C. 468, 30 S. E. 481, Mikell Illus. Cas. Criminal Law, 20.

[5] See 4 Bl. Comm. 11. For a discussion of the various theories of punishment, see 1 Whart. Cr. Law, §§ 1–13, and notes.

[6] Post, pp. 24, 25.

the more important crimes at common law have become fixed by judicial decision. Nevertheless, before the definitions of crimes had become crystallized, in determining whether the act complained of was a crime, the question whether the act was injurious to the public, as distinguished from the individual, was a test which the courts constantly applied;[7] and the test is still applied in determining whether particular acts fall within the definition of certain crimes, —such as nuisance[8] and offenses against the public peace,[9] of which injury to the public is an essential element. Statutes may sometimes seem to punish for purely private wrongs, although they are not supposed to punish for anything unless the public good so requires; and any act which falls within the statutory definition, within constitutional limits, is necessarily a crime. The question of the ground of punishment is for the legislators.[10]

Trifling Offenses not Noticed

Public policy clearly does not require the state to interfere and punish for an act unless it injures the public to a material extent, and the criminal law, therefore, does not usually notice trifling offenses. Nor does it notice wrongs which, though of serious injury to an individual as an individual, do not perceptibly injure or endanger the other members of the community. Of course, in theory, no injury can be done to one member of the community without injury to the community itself, but the injury is so slight in many cases that the act may be classed with the trifling

[7] Rex v. Wheatly, 2 Burrows, 1125; Com. v. Warren, 6 Mass. 72; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256.

[8] Post, p. 396.

[9] Post, p. 453.

[10] See Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 784, 52 Am. St. Rep. 496.

offenses which the law does not notice.[11] This brings us to the distinction between a public and a private wrong, and the difference between the nature and purpose of the proceedings by which the one is punished and the other redressed.

Distinction between Crimes and Torts

The law affords redress for any act done by a person which inflicts injury on another. It does not, however, call all such acts crimes. Some it regards as mere torts or civil wrongs, entitling the person injured to damages from the wrongdoer but not otherwise subjecting the wrongdoer to punishment.[12] Whether an act is a crime, or a tort only, depends, in general, on whether the good of the state is best subserved by denouncing it as an offense and annexing a penalty to the act, and providing for prosecution by the state or by leaving it to the individual to seek redress in damages in a private action for the injury suffered.

In the absence of an express statute declaring an act to be a crime, the test usually applied by the courts is the effect of the act upon the community. If the act is such as to affect injuriously the community as a community, such act is a crime; if, however, the act injuriously affects an individual only, or in affecting an individual also affects the community, but only in a slight degree, such act is only a tort. Thus, if A. merely trespass upon B.'s land,[13] or if A. maintain on his own land, near B.'s dwelling, a filthy pond,

[11] 1 Bish. New Cr. Law, §§ 212–228.

[12] 4 Bl. Com. 5; 1 Whart. Cr. Law, § 15; 1 Bish. New Cr. Law, §§ 229–254; Jag. Torts, 8. For a clear statement of the distinction, see Cooley, Torts (2d Ed.) pp. 94–103.

[13] Rex v. Turner, 13 East, 228; Com. v. Powell, 8 Leigh (Va.) 719; Henderson v. Commonwealth, 8 Grat. (Va.) 708, 56 Am. Dec. 160; Kilpatrick v. People, 5 Denio (N. Y.) 277.

the odors from which reach no one but B.,[14] A. commits a wrong against B., but does not perceptibly injure the other members of the community. In such a case the public good does not require the state to interfere and punish A., but it is considered sufficient if B. is allowed to bring an action against A. in his own name for redress. The wrong is a civil injury or tort, and the proceeding a civil action. If, on the other hand, A. enter on B.'s land with force and arms,[15] or if A. maintain a filthy pond in a thickly-settled community,[16] A. injures the whole community; for, in the first case, A. commits a breach of the public peace, and, in the second, A. endangers the public health and comfort. Here the public good requires the state to notice the wrong, and punish it. The proceeding by the state is in no sense to obtain redress or compensation,[17] but is to punish A. and furnish an example to prevent similar acts in the future. This is a criminal proceeding or prosecution, and the act is a crime.

It is not to be supposed, however, that all wrongs which affect the public injuriously have always been crimes. At common law many wrongs which are to-day deemed public wrongs were treated only as private wrongs, and cognizable only by the civil courts. Thus, at common law it was not a crime to deprive a man of his goods or money by embezzlement or by false pretenses (except by false symbols or tokens[18]), although in such cases the injury to the public,

[14] COM. v. WEBB, 6 Rand. (Va.) 726, Mikell Illus. Cas. Criminal Law, 1.

[15] Post, p. 461. [16] Post, p. 898.

[17] Hager v. Thomas, 44 Pa. 128, 84 Am. Dec. 422. If the manifest purpose of a criminal prosecution is to enforce payment of a debt, or to punish its nonpayment, the courts will not lend their aid thereto. State v. Miller, 44 Mo. App. 159.

[18] Cheating by use of false weights and measures, that may de-

according to modern views, is at least as great as if the goods or money were obtained by larceny, [19] which was a crime. Embezzlement,[20] obtaining property by false pretenses,[21] and many other public wrongs have been made crimes only by statute.

Civil and Criminal Proceedings for the Same Wrong [22]

An act may, however, constitute both a crime and a tort, subjecting the doer to punishment at the hand of the state and rendering him liable to pecuniary damages in a civil suit by the individual immediately injured. The two proceedings are distinct, however, and have a different object, the one being to punish as an example, while the other is to obtain redress for the injury. Neither proceeding is a bar to the other.[23] The fact, therefore, that one has been held liable for damages in a civil action by an individual, is no defense when he is criminally prosecuted by the state. In cases of misdemeanor, the civil action may be brought before institution of the criminal prosecution, and carried on at the same time.[24] In cases of felony, which is a more ser-

fraud the public generally, was a public wrong and a crime at common law; but cheating by lying and false representations was a mere private injury. Rex v. Wheatly, 2 Burrows, 1125. And see Rex v. Dunnage, Id. 1130; Hartman v. Com., 5 Pa. 60; Com. v. Warren, 6 Mass. 72; People v. Miller, 14 Johns. (N. Y.) 371.

[19] Post, p. 305. [20] Post, p. 351. [21] Post, p. 360.

[22] 4 Bl. Comm. 6; 1 Whart. Cr. Law, § 31b; Cooley, Torts (2d Ed.) p. 101. For a review of the cases on this question, see Benn. & H. Lead. Cr. Cas. 42–50.

[23] Plummer v. Smith, 5 N. H. 553, 22 Am. Dec. 478; White v. Fort, 10 N. C. 251; State v. Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; Knox County v. Hunolt, 110 Mo. 67, 19 S. W. 628; Austin v. Carswell, 67 Hun, 579, 22 N. Y. Supp. 478; Lofton v. Vogles, 17 Ind. 107; Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 83; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

[24] Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698.

ious grade of crime, it was formerly the rule in England and in a few of the states that the civil remedy was suspended until the wrongdoer had been prosecuted; but this doctrine has been questioned in England, and is not generally recognized in the United States.[25]

Condonation of a Crime by the Person Injured

Another distinction between torts and crimes should be noticed. In case of a tort, the person injured is alone concerned; hence he may settle with the wrongdoer, or may refrain from bringing an action against him. In case of a crime, however, it is the public that is injured; hence, as a rule, the person particularly injured has no control over the criminal proceedings, and no settlement between him and the wrongdoer can make the act any the less a crime, or take away the state's right to punish it. Thus it has been held that a woman who has been ravished cannot condone the crime by forgiving her ravisher;[26] nor can one who is indicted for obtaining money by false pretense show in de-

[25] The notion once prevailed that the civil remedy was merged in the felony, but whether the doctrine of an absolute merger ever existed has been doubted. Wells v. Abrahams, L. R. 7 Q. B. 554. In modern times it has been held in England that the merger amounts only to a suspension, as stated in the text. Lutterell v. Reynell, 1 Mod. 282; Crosby v. Leng, 12 East, 409; Osborn v. Gillett, L. R. 8 Exch. 88; White v. Spettigue, 13 Mees. & W. 603. Moreover, it has been doubted whether the doctrine existed even to this limited extent. Wells v. Abrahams, supra. In the United States the doctrine of the suspension of the civil remedy has been held by some courts. Boody v. Keating, 4 Greenl. (Me.) 164; Martin's Ex'r v. Martin, 25 Ala. 201. But it has more frequently been denied. Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 83; Williams v. Dickenson, 28 Fla. 90, 9 South. 847. See Bishop New Cr. Law, §§ 267–272; Jag. Torts, 11.

[26] Com. v. Slattery, 147 Mass. 423, 18 N. E. 399. See, also, Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Thalheim v. State, 38 Fla. 169, 20 South. 938.

fense that he had settled with the person defrauded by returning the money obtained.[27]

Indeed, in the case of felonies (a name given to the more serious crimes, which will be explained hereafter), a person settling with the offender, and agreeing not to inform on him, is himself guilty of a crime.[28] Statutes have been enacted in some states making exceptions in some cases to the rule that the individual immediately injured cannot condone the offense, and allowing the wrongdoer to make reparation, and relieving him from punishment on his doing so.

These exceptions relate generally to misdemeanors, or crimes of lesser degree. Thus in Michigan it is provided that prosecutions for adultery can be instituted only on the complaint of the husband or wife of one of the offending parties; if such complaining party condone the offense, the guilty party cannot be prosecuted therefor.[29]

Consent of Person Injured

With respect to civil wrongs the rule "volenti non fit injuria" prevails; i. e., no man can complain of an act to which he consents. Whether or not consent of the person injured by an act deprives it of its criminal character depends upon the nature of the act. No man can take his

[27] WILLIAMS v. STATE, 105 Ga. 606, 31 S. E. 546, Mikell Illus. Cas. Criminal Law, 4. Embezzlement, settlement by defendant's bondsmen no defense. Fleener v. State, 58 Ark. 98, 23 S. W. 1; Robson v. State, 83 Ga. 166, 9 S. E. 610. A compromise is no bar to a prosecution for seduction. Barker v. Com., 90 Va. 820, 20 S. E. 776. Ratification is not a bar. State v. Frisch, 45 La. Ann. 1283, 14 South. 132; May v. State, 115 Ala. 14, 22 South. 611. Nor can forgery be condoned. State v. Tull, 119 Mo. 421, 24 S. W. 1010. See, also, post, p. 440.

[28] Post, p. 440.

[29] See People v. Dalrymple, 55 Mich. 519, 22 N. W. 20; Com. v. Carr, 28 Pa. Super. Ct. 122; State v. Smith, 108 Iowa, 440, 79 N. W. 115.

own life or maim himself, these being among the inalienable rights, and he cannot consent to another's killing or maiming him.[30] Nor can a person consent to a breach of the public peace,[31] or to acts endangering the public safety or the public morals.[32] Thus, it is a crime to engage in mutual combat in a public place, and the consent of the parties furnishes no excuse. So certain crimes require for their commission the consent of the parties, as fornication, adultery, and incest; therefore the consent of the parties furnishes no defense. On the other hand, there are rights which a man may give up. He may consent to what would otherwise be an assault and battery, provided it does not maim or cause severe bodily injury, and is not inflicted so as to be a breach of the peace. Mutual combat in private, where the parties are not maimed, or severely injured, is no crime.[33] Again, in certain crimes, such as rape and larceny, and, as a rule, in crimes against property, want of consent is of the essence of the crime; and hence, if there is consent, the crime is not committed. It is not rape to have intercourse with a woman who consents, since, to constitute rape, the intercourse must be by force, and against her will.[34] So, to constitute larceny, the property must be taken without the owner's consent.[35] And in cases of extortion by putting in fear, or

[30] Killing in duel: Reg. v. Barronet, Dears. Cr. Cas. 51; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396. Administering poison: Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350. Maiming: 1 Inst. 107a, 107b; WRIGHT'S CASE, Co. Litt. 127a, Mikell Illus. Cas. Criminal Law, 5; People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303. See Reg. v. Bradshaw, 14 Cox, Cr. Cas. 83 (football match).

[31] Post, p. 275. And see Fost. Cr. Law, 260; 1 East, P. C. 270; Rex v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

[32] Com. v. Barrett, 108 Mass. 302; Sanders v. State, 60 Ga. 126; Tucker v. State, 8 Lea (Tenn.) 633.

[33] Post, p. 243. [34] Post, p. 245. [35] Post, p. 320.

of robbery which is committed by force or intimidation, if the property is delivered by the owner for the purpose of prosecuting the taker, the crimes are not committed.[36] In those cases where consent is a good defense, the consent, to be effective, must be a real consent; if the consent is obtained by force or threats,[37] or by fraud as to the nature of the act,[38] or if, because of mental defect or by reason of youth, one is in law incapable of consenting, his consent furnishes no excuse.[39] In some states a statute makes it rape to have intercourse with a female under a certain age, whether she consents or not. Here, of course, consent is no excuse, however mentally capable of consenting the girl may have been.[40]

Same—Entrapment into Crime

Where a person entraps another into the commission of an act the same principles apply. If the acts of entrapment amount to consent, and the crime for which the accused is indicted is one for which consent is an excuse, then the accused cannot be convicted. If, however, the crime is one for which consent is no excuse, or the acts of entrapment do not amount to consent, then the fact that the accused was entrapped into the crime is no defense.[41]

[36] People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072; Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295.

[37] Post, pp. 242, 275, 297, 377.

[38] THE QUEEN v. FLATTERY, 2 Q. B. D. 410, Mikell Illus. Cas. Criminal Law, 137; Rex v. Rosinski, 1 Moody, 19; Reg. v. Case, 4 Cox C. C. 220.

[39] State v. Rollins, 8 N. H. 550; State v. Farrar, 41 N. H. 53; COM. v. NICKERSON, 5 Allen (Mass.) 518, Mikell Illus. Cas. Criminal Law, 148; Givens v. Com., 29 Grat. (Va.) 830; Hadden v. People, 25 N. Y. 373.

[40] Post, p. 246.

[41] Entrapment by detective into illegal sale of liquor, no de-

The owner of property, on learning that an attempt is to be made to steal it, may leave it exposed, and the person who takes it may be guilty of larceny; but, if he consents to the taking for the purpose of prosecuting the offender, there is no crime, as property must be taken without the owner's consent to constitute the crime of larceny.[42] The same is true of robbery.[43] In case of burglary, if the owner knows that it is to be committed, and merely takes no steps to prevent it, but lies in wait to catch the burglar, he does not consent to the entry,[44] though it is otherwise if he takes steps to aid the intending burglar, as where he unlocks the

fense, People v. Murphy, 93 Mich. 41, 52 N.W. 1042; People v. Curtis, 95 Mich. 212, 54 N.W. 767; City of Evanston v. Myers, 172 Ill. 266, 50 N. E. 204. See, also, post, pp. 117, 335. One who accepts a bribe is not excused because instigated by others for entrapment. People v. Liphardt, 105 Mich. 80, 62 N. W. 1022. See, also, State v. Dudoussat, 47 La. Ann. 977, 17 South. 685. Conspirator to rob may be convicted though entrapped into attempt. Thompson v. State, 106 Ala. 67, 17 South. 512. It is no objection to conviction for mailing obscene matter that a government inspector, who instigated the proceeding, wrote decoy letters, in answer to which defendant mailed the matter. Price v. U. S., 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727. Nor is it a defense to an indictment for illegally selling liquor that the liquor was purchased by the buyer, not for his own use, but with money furnished by the chief of police for the purpose of entrapping defendant. State v. Smith, 152 N. C. 798, 67 S. E. 508, 30 L. R. A. (N. S.) 946.

[42] Rex v. Headge, 2 Leach, 1033; Reg. v. Lawrance, 4 Cox, Cr. Cas. 438; Pigg v. State, 43 Tex. 108; People v. Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238 (feigning drunken sleep not consent); State v. Hull, 33 Or. 56, 54 Pac. 159, 72 Am. St. Rep. 694; State v. Adams, 115 N. C. 775, 20 S. E. 722.

[43] McDaniel's Case, Foster, 121; Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295.

[44] Rex v. Bigley, 1 Craw. & D. 202; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 364; State v. Sneff, 22 Neb. 481, 35 N. W. 219; State v. Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284 (failure to fasten door securely, as usual, no defense).

door to admit him, or instructs his servant to do so.[45] If the owner of a store, or his servant, by his authority, instigates a person to break and enter for the purpose of stealing, the latter is not criminally liable for burglary, for the entry was consented to;[46] but he may be liable for larceny in taking goods after the entry, for the owner may consent to the entry, and not to the taking of the goods.[47]

Crime or Negligence on the Part of the Person Injured.

The fact that a person who has been injured by a crime was in the wrong, or guilty of negligence contributing to the injury, does not as a rule furnish an excuse for the crime, for this does not make the act any the less an injury to the public.

A person who has stolen property cannot defend on the ground that the taking was due to the negligence of the owner;[48] nor can he defend on the ground that it had been stolen by the person from whom he stole it.[49] On a prosecution for obtaining goods by false pretense, it is no defense that the prosecutor was himself trying to cheat the defendant, or do other unlawful acts;[50] and one may be con-

[45] Rex v. Egginton, 2 Leach, 913; Allen v. State, 40 Ala. 334, 91 Am. Dec. 477; SPEIDEN v. STATE, 3 Tex. App. 157, 30 Am. Rep. 126, Mikell Illus. Cas. Criminal Law, 8; Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139; 1 Bish. New Cr. Law, § 262, and cases cited.

[46] People v. McCord, 76 Mich. 200, 42 N. W. 1106.

[47] Rex v. Egginton, 2 Leach, 913.

[48] Post, p. 335.

[49] Com. v. Finn, 108 Mass. 466; Ward v. People, 3 Hill (N. Y.) 395. See, also, Rex v. Beacall, 1 Car. & P. 454. It is no defense to an indictment for larceny of liquors, or for embezzlement of the proceeds of their sale, that they were kept for sale or sold in violation of law. Com. v. Smith, 129 Mass. 104.

[50] It is no defense to an indictment for obtaining money under false pretense that the money was obtained in selling to the prose-

victed for uttering counterfeit money, in giving it to a prostitute in return for allowing sexual intercourse.[51] In some cases the conduct of the person injured may in law amount to an excuse or a justification for the injury. Thus, as will be seen hereafter, a person may repel an attack without being criminally liable for injury necessarily inflicted in doing so.[52]

It will hereafter be seen that a person who causes another's death by culpable negligence—as, for instance, by careless driving—is guilty of manslaughter. In such cases contributory negligence on the part of the deceased is not a defense;[53] nor is negligence on the part of a person wounded in caring for himself, although it contributes to his death, a defense in favor of one charged with causing the death.[54]

Mental Element in Torts and Crimes

Still another distinction between crimes and torts is in the fact that, to render one criminally liable for an act, the law requires that he shall have had a criminal intent, so that a lunatic or a very young child, not being able to entertain such an intent, is incapable of committing crime, while it is otherwise in case of torts, where the person injured seeks

cutor counterfeit money which the prosecutor was buying for illegal purposes. Horton v. State, 85 Ohio, 13, 96 N. E. 797, 36 L. R. A. (N. S.) 423, Ann. Cas. 1913B, 90. See, also, Reg. v. Hudson, 8 Cox, Cr. Cas. 305; Com. v. Morrill, 8 Cush. (Mass.) 571; In re Cummins, 16 Colo. 451, 27 Pac. 887, 13 L. R. A. 752, 25 Am. St. Rep. 291; People v. Martin, 102 Cal. 558, 36 Pac. 952. See, also, post, p. 371. "If the other party has also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment, because each deserved it equally." Per Dewey, J., in Com. v. Morrill, supra. But see, contra, McCord v. People, 46 N. Y. 470.

[51] Anonymous, 1 Cox, Cr. Cas. 250.

[52] Post, pp. 181, 272.

[53] Post, p. 238.

[54] Post, p. 166.

redress. A lunatic, or an infant under seven years of age, is liable in damages for a wrongful act, but he cannot be prosecuted criminally therefor.[55]

Crime may be One of Omission

As stated in the definition, a crime may be one of omission, or, in other words, a person may commit a crime by remaining perfectly passive when the law requires him to act. Thus a switchman who neglects to set a switch, thus causing derailment of a train and consequent loss of life, is guilty of a crime;[56] and so is a father who, though able to do so, fails to furnish food to a child who is dependent upon him and who dies from the neglect.[57] Hereafter, as in previous sections, the term "act" will be intended to include omission to act where the law requires action.

Punishability Not an Absolute Test

The mere fact that punishment in some form is imposed for the doing of a forbidden act does not of itself make the act a crime; and it cannot be said without more that a crime is an act forbidden under pain of punishment. The object of the punishment must be considered, and the nature of the proceeding in which it is inflicted. The punishment must be inflicted on the ground of injury to the public at large, and by the state. There are a number of private wrongs, such as slander, false imprisonment, prosecution without cause, etc., for which, in case of malice, the law allows the person injured to recover, in a civil action, damages in excess of his actual injury. They are known as "punitive" or

[55] Post, p. 61. And see Cooley, Torts (2d Ed.) p. 97.

[56] STATE v. O'BRIEN, 32 N. J. Law, 169, Mikell Illus. Cas. Criminal Law, 34.

[57] Post, p. 234.

"exemplary" damages, and are allowed, as the terms imply, as a punishment and example.[88] So, also, in case of certain penal statutes, such as those prescribing a penalty for unlawful sale of intoxicating liquors, if the penalty is recoverable by indictment in the name of the state, the proceeding is criminal, but, if it is recoverable by an action of debt, the proceeding is civil.[89]

Indictability Not an Absolute Test

Nor can the mere fact that a wrongful act renders one liable to indictment in the name of the state determine absolutely that the act is a crime. You must look at the object of the proceeding, for the state has a right to allow this method for obtaining redress for a private individual. Thus, in some states there are, or formerly were, statutes under which, if a death is caused by the wrongful act of the servants or agents of a corporation, an indictment lies against it to recover a penalty, in the nature of damages, for the benefit of the widow and children of the deceased.[90] Such statutes are, however, rare, and in general indictability is the best test of whether an act is a crime. It may not be out of place to say also in this connection that, in some of the states, criminals are proceeded against in some cases by information, and not necessarily by indictment.

[88] The rule allowing punitive damages applies as well to cases where the wrongful acts are within the law for punishment of crimes as to those where they are not. Boetcher v. Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. St. Rep. 295. In an action for assault and battery, that defendant had been punished criminally for the assault is not a bar to recovery of exemplary damages. Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

[89] See 1 Bish. New Cr. Law, § 32, and cases cited.

[90] Pub. St. Mass. c. 112, §§ 212, 213; Tiff. Death Wrong. Act, § 186.

Mala in Se and Mala Prohibita

The books make a distinction between crimes which are mala in se, or wrongful from their nature, and punishable at common law, such as murder, robbery, rape, and many lesser offenses, and those that are mala quia prohibita, or wrong merely because prohibited by statute.[61] The distinction is sometimes of practical importance. If an act is prohibited by statute on pain of punishment, the violation of the statute is a crime. Again, an act which is wrong from its very nature, and a crime at common law, may be defined and prohibited by statute; and, as will hereafter be seen, in some states the common law has been abrogated, and no act is a crime unless prohibited by statute.

[61] COM. v. ADAMS, 114 Mass. 323, 19 Am. Rep. 362, Mikell Illus. Cas. Criminal Law, 30.

CHAPTER II

THE CRIMINAL LAW—HOW PRESCRIBED

3. How the Criminal Law is Prescribed.
4. The Common Law.
5–6. Statutes.

HOW THE CRIMINAL LAW IS PRESCRIBED

3. The criminal law consists both of statutes, or express enactments of the lawmaking power of the state, and of the common or unwritten law.

THE COMMON LAW

4. The common law is a body of law which derives its authority, not from express enactments of the lawmaking power of the state, but from the immemorial practice of the people. Its principles have been accepted as law from time immemorial, and are evidenced by decisions of the courts applying them to particular cases.

(a) The common law of England, so far as it was applicable to the new conditions of the American colonists, together with some old English statutes, was brought with them to this country, and is now the common law with us, except so far as it has been modified or superseded by statutes.

(b) There are no crimes against the United States government by virtue of the common law ex proprio vigore.

The Common Law Defined and Explained

The common law, in the sense in which it is here used, is a body of law which derives its authority, not from express enactments of the legislative power, like the statute law, but from the fact that it has existed and been accepted as the law from time immemorial. It is preserved and evidenced by judgments of the courts applying it to particular cases as they arise. As said by Sir James Stephen: "It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the state. Indeed, even in our own time and country that conception of it is gaining ground very slowly. An earlier, and to some extent a still prevailing, view of it is that it is more like an art or science, the principles of which are at first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances. Somehow, no one can say precisely how, though more or less plausible and instructive conjectures upon the subject may be made, certain principles came to be accepted as the law of the land. The judges held themselves bound to decide the cases which came before them according to those principles, and, as new combinations of circumstances threw light on the way in which they operated, the principles were, in such cases, more and more fully developed and qualified, and, in others, evaded or practically set at naught and repealed. Thus, in order to ascertain what the principle is at any given moment, it is necessary to compare together a number of decided cases, and to deduce from them the principle which they establish." [1] This law is spoken of as the unwritten law, or lex non scripta, to distinguish it from the statutory law. The common law is in fact unwritten, though it is evidenced by writing. A decision

[1] Steph. Cr. Law, Introduction, viii.

and judgment of a court declaring a principle of law, and applying it to a particular case, is reduced to writing, and published in the Reports, but the written report is not the law, nor does the law derive its authority from the fact that the decision is written. The report is merely evidence of the law—a written account of the application to a particular case of a principle of law which is still unwritten.[8]

The Common Law in the Several States

When our country was settled, the colonists from England brought with them so much of the common law of the mother country, and such acts of parliament, as were applicable to their new condition and surroundings, and this law became the common law of the original colonies, and of the new settlements as the colonies extended, and remained with them when they became independent states. In some of the states this body of law was expressly adopted by the Constitution or by statutes. In a Massachusetts case it is said: "Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes passed since the emigration were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages originating probably from laws passed by the Legislature of the colony of Massachusetts Bay, which were annulled by the

[8] 1 Bl. Comm. 63 et seq.; Com. v. Chapman, 13 Metc. (Mass.) 68.

repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people." [3] Texas, though originally governed by the civil law derived from Mexico, afterwards adopted the common law. In Louisiana the statute, after defining crimes, provides that "all crimes, offenses, and misdemeanors shall be taken, intended, and construed according to and in conformity with the common law of England." It may be said now that, except where it has been changed by statute, the common law of England, so far as it is applicable to our conditions, and some of the old English statutes, are the common law in all of the United States,[4] except in some few states, where statutes have been enacted intended to cover the whole field of criminal law. In those states no act is a crime unless made so by statute; but even in those states the common law is still in force for the pur-

[3] Com. v. Knowlton, 2 Mass. 530; 1 Kent, Comm. 470. And see Com. v. Churchill, 2 Metc. (Mass.) 118; Com. v. Leach, 1 Mass. 59; Com. v. Warren, 6 Mass. 72, 73; Com. v. Chapman, 13 Metc. (Mass.) 68; Respublica v. Mesca, 1 Dall. (Pa.) 73, 1 L. Ed. 42. "It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the Revolution, we had formed a system of our own, founded in general on the English Constitution, but not without considerable variations." Guardians of the Poor v. Greene, 5 Bin. (Pa.) 554.

[4] Com. v. Callaghan, 2 Va. Cas. 460; STATE v. BUCHANAN, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell Illus. Cas. Criminal Law, 95; Stuart v. People, 3 Scam. (Ill.) 395; Sans v. People, 3 Gilman (Ill.) 327; Dawson v. Coffman, 28 Ind. 220; State v. Pulle, 12 Minn. 164 (Gil. 99); Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; In re Lamphere, 61 Mich. 105, 27 N. W. 882. The common-law punishment for a common scold, ducking, was not received nor embodied by usage, so as to become a part of the common law in Pennsylvania. James v. Com., 12 Serg. & R. 220.

pose of construing the statutes, and in the field of criminal procedure.

English Common-Law Authority not Essential

Although our common law was thus brought with our ancestors from England, there are common-law crimes with us for which there can be found no direct authority in the English decisions. The reason for this is found partly in the difference between the institutions of the two countries, and partly in the fact that certain acts were covered by statutes in England when they first required notice, and have been punished under the statutes, instead of under the common law. The fact, therefore, that there is no common-law authority in England declaring a certain act a crime, does not determine that it is not a common-law crime with us. In England, where they have an established church, adultery and other acts of lewdness were punished exclusively in the ecclesiastical courts, and therefore we can find no cases in which they were punished under the common law. In some of our states adultery has been held a common-law crime. Other states, on the contrary, have refused so to hold, and have declared it could not be punished in the absence of a statute declaring it a crime.[5] So, also, in England there have been, since an early day, penal statutes covering almost every kind of malicious injury to property, and there are therefore few cases in which malicious mischief has been there punished at common law. It is, however, a well-settled principle of the common law that all acts tending to a breach of the public peace are crimes, and we have many cases in which acts of malicious mischief have been punished as common-law crimes.[6] Whether or not, therefore, an act is a common-law crime with us, does

[5] Post. p. 410.

[6] Post, pp. 382, 383.

not necessarily depend on the existence of common-law authority in England.[7]

The Common Law Prohibits as Well as Punishes.

It will be noticed that in the definition of crime it was said to be an act "prohibited" by law. This feature of the definition has been objected to, on the ground that it is inadequate where the common law is recognized, because the common law determines from the reason of the thing that a particular act is a crime. The common law, however, does prohibit. To say otherwise would be to say that the common law makes an act punishable which was not against the law when it was committed, and no civilized nation would punish such acts. The common law says that no one shall commit murder, robbery, rape, etc., and that, if he does so, he will be punished. This prohibition is evidenced by the judicial decisions, and furthermore, is written in the heart and conscience of every mentally responsible human being. There are acts, it is true, which may never before have been committed, but, which, when they are committed, may be punished. They will not be punished, however, unless they violate the general principles of the common law, and unless they are mala in se, or wrong in themselves. The common law punishes acts tending to a breach of the public peace, acts injurious to the public health and comfort, acts injurious to the public morals, and acts having certain other tendencies. Any acts, therefore, which have such effect, are prohibited by the common law. The fact that a man does not know what the general sanctions of the common law prohibit is immaterial, for he is presumed to know the law, and ignorance is no excuse.[8]

[7] Com. v. McHale, 97 Pa. 407; Com. v. Hoxey, 16 Mass. 385.
[8] Post, p. 87.

There is certainly no hardship in this so far as the common law is concerned, for it only punishes acts which are mala in se, or wrong in their very nature, and which are therefore contrary to the dictates of conscience. The hardship, if any, is in case of the statute law, where it prohibits an act which is only wrong because of the statute. Even here ignorance of the statute is no excuse for violating it.

Morality and Christianity

Morality and the teachings of Christianity have had an influence in the formation of the common law, as well as on legislators. They may be the cause of an act being prohibited by the common law or by statute, but an act is not a crime simply because it is immoral, nor because it is contrary to the doctrines of Christianity. It is true that an act is a crime if it shocks the moral sense of the community, and creates a public scandal, but this is because of the injury to the public. The same act which would be a crime if done in public is not punished at all if done in private, though it is none the less immoral. Some of the writers on criminal law make the broad assertion that Christianity is a part of our common law, and there are statements to the same effect by some of the judges;[•] but the assertion is too broad. No court in this country would punish a man because he does not believe in the doctrines of Christianity, or because he argues against the truth of Christianity. Our Constitution expressly declares that no man's religious liberty shall be interfered with, and a man is free in this country, as far as the law is concerned, to worship Mohammed or the sun, without being liable to punishment. The com-

•1 Bish. New Cr. Law, § 497; May, Cr. Law, § 43; Updegraph v. Com., 11 Serg. & R. (Pa.) 394; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Vidal v. Girard, 2 How. 127, 11 L. Ed. 205.

fort, the peace, and the morals of the community are protected by the common law, and it punishes acts which have a tendency to injure them, but it does not interfere with one's religious views. Disturbance of a church meeting is a common-law crime, but this is because of the breach of the public peace, and not because of the religious character of the meeting, for disturbance of an assemblage to argue against Christianity is equally a crime. A person may shut himself up in a room and blaspheme without being amenable to punishment; but, if he blasphemes in a public place, it is otherwise. This is not because of the sin, but because the blasphemy is a public nuisance, or because it tends to a breach of the public peace.[10]

No Common-Law Crimes against the United States

There are no common-law crimes against the United States, either within state limits or within territory within the exclusive jurisdiction of the United States. It can punish no offenses that have not been expressly defined, and made punishable by an act of Congress.[11]

[10] 1 Whart. Cr. Law, § 20, citing Cooley, Const. Lim. 472; 13 Alb. Law J. 366; 20 Alb. Law J. 265, 285; Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Chapman v. Gillet, 2 Conn. 40; Lindenmuller v. People, 33 Barb. (N. Y.) 548; Com. v. Jeandell, 2 Grant Cas. (Pa.) 506; People v. Porter, 2 Parker, Cr. R. (N. Y.) 14; Bloom v. Richards, 2 Ohio St. 387; Board of Education of City of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637. And see People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Com. v. Kneeland, 20 Pick. (Mass.) 206. Post, p. 401.

[11] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; 1 Kent, Comm. 331. See, also, post, p. 491 et seq.

STATUTES

5. The state Legislatures can punish any act unless restricted by the state or federal Constitution.

6. The United States Congress has no power to declare and punish crimes except such as is derived from the federal Constitution.

Statutory Crimes

In addition to crimes at common law, there are statutory crimes; that is, acts declared criminal by express enactments of the lawmaking power. After the Legislature expressly prohibits an act, and makes it a crime, there is no longer any test of public policy to be applied. The Legislature has presumably enacted the law for the public good, and the courts cannot look further into its propriety than to ascertain whether the Legislature had the power to pass it.[12]

Same—Power of the State Legislatures

The Legislatures of the different states have the inherent power to prohibit and punish any act, provided they do not violate the restrictions of the state and federal Constitutions.

Same—Power of the United States Congress

The United States Congress also has power to a certain extent to define and punish crimes, but it has only such power as is expressly or by implication conferred by the

[12] Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Parker v. State ex rel. Powell, 132 Ind. 419, 31 N. E. 1114.

federal Constitution.[13] Unlike the state Legislatures, it has no inherent power.[14]

Same—The Powers Conferred on Congress by the Constitution

The Constitution gives Congress the power to regulate commerce with foreign nations and between the several states;[15] to provide for the punishment of counterfeiting the securities and current coin of the United States; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;[16] to make rules for the government and regulation of the land and naval forces; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and, finally, to make all

[13] Post, p. 491.

[14] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; U. S. v. Coolidge, 1 Wheat. 415, 4 L. Ed. 124.

[15] This provision prevents the states from passing any penal statute interfering with commerce. State v. Pratt, 59 Vt. 590, 9 Atl. 556; In re Kimmel (D. C.) 41 Fed. 775; Ex parte Thomas, 71 Cal. 204, 12 Pac. 53; Com. v. Gardner, 133 Pa. 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. Rep. 645; Territory v. Evans, 2 Idaho (Hasb.) 658, 23 Pac. 115, 7 L. R. A. 288; In re Rebman (C. C.) 41 Fed. 867; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Ex parte Kieffer (C. C.) 40 Fed. 399.

[16] Congress may punish, as an offense against the law of nations, counterfeiting in United States of notes of foreign banks. U. S. v. Arjona, 120 U. S. 479, 7 Sup. Ct. 628, 30 L. Ed. 728.

laws which shall be necessary and proper for carrying into execution the powers given it, and all other powers, vested by the Constitution in the government of the United States, or in any department or officer thereof.[17] Congress is also given power to enforce, by appropriate legislation, the prohibition against slavery or involuntary servitude in the United States,[18] and to punish treason.[19]

Same—Express Restrictions of the Federal Constitution

To give the student a general idea of the constitutional provisions bearing on the criminal law, including questions of procedure, it will be well to show the restrictions laid down by the Constitution. They do not apply, however, to the states, except where it is so expressed.[20] Thus, it is provided that the trial of all crimes, except in cases of impeachment, shall be by jury, and shall be held in the state where the crime was committed.[21] The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and describing the place to be searched and the persons or things to be seized.[22] No person can be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in certain cases; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life,

[17] Const. U. S. art. 1, § 8. [18] Const. U. S. Amend. art. 13.
[19] Const. U. S. art. 3, § 3.
[20] Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; Boyd v. Ellis, 11 Iowa, 97.
[21] Const. U. S. art. 3, § 2. [22] Const. U. S. Amend. art. 4.

liberty, or property without due process of law.[23] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses for him; and to have the assistance of counsel for his defense.[24] Excessive bail connot be required, nor excessive fines imposed, nor cruel and inhuman punishments inflicted.[25] No state can make any law or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor can any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[26] It will be observed that the foregoing provisions, except the last, have reference only to powers exercised by the government of the United States, and not to those of the states.[27]

Same—Power of Territorial Legislatures

The federal Constitution provides that Congress shall have full power to make all needful rules and regulations respecting the territory and other property belonging to the United States,[28] but the general and plenary control of Congress over the territories arises not merely from this grant of power, but also from the right of the national govern-

[23] Const. U. S. Amend. art. 5.
[24] Const. U. S. Amend. art. 6.
[25] Const. U. S. Amend. art. 8.
[26] Const. U. S. Amend. art. 14, § 1.
[27] Ellenbecker v. District Court, supra.
[28] Const. U. S. art. 4, § 3.

ment to acquire territory, flowing from the power to declare war and make treaties.[29] As a general rule, Congress has seen fit to invest the people of the territories with a certain measure of self-government by authorizing the election of legislative assemblies possessing general power of legislation. The plenary control of Congress extends to the acts of such legislatures.[30] They may make any laws on proper subjects of legislation, not in conflict with the federal Constitution, the organic act, and other laws of Congress.[31]

Same—Ex Post Facto Laws are Unconstitutional and Void[32]

The Constitution of the United States prohibits Congress or any state from passing an ex post facto law, and there are similar provisions in the state Constitutions. Such a law is one passed after the commission of an act which changes the legal consequences of the act to the wrongdoer's prejudice.[33] The term includes (1) every law which

[29] Church of Jesus Christ of Latter Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481; American Ins. Co. v. Canter, 1 Pet. 511, 7 L. Ed. 242; U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. See Black, Const. Law, 19, 115, 207.

[30] First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046.

[31] Miners' Bank v. Iowa, 12 How. 1, 13 L. Ed. 867; Vincennes University v. Indiana, 14 How. 268, 14 L. Ed. 416; Ferris v. Higley, 20 Wall. 375, 22 L. Ed. 383; American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; Springville v. Thomas, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; Territory v. Doty, 1 Pin. (Wis.) 396; Smith v. Odell, 1 Pin. (Wis.) 449; Swan v. Williams, 2 Mich. 427.

[32] Const. U. S. art. 1, §§ 9, 10. See Whart. Cr. Law, §§ 29, 30, and notes; Bish. St. Crimes, §§ 29, 85, 180, 185, 265–267; Black, Law Dict. tit. "Ex Post Facto Law."

[33] For definition see Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.

makes an act committed before its passage, and which was innocent when done, criminal, and punishes it; (2) or which aggravates a crime, and makes it greater than when committed; (3) or which changes the punishment, and inflicts a greater or different punishment;[84] (4) or which changes the

[84] Change of punishment from death to imprisonment until governor shall issue his warrant, and then death, HARTUNG v. PEOPLE, 22 N. Y. 95, Mikell Illus. Cas. Criminal Law, 14; Id., 26 N. Y. 167; and see Ratzky v. People, 29 N. Y. 124, and In re Petty, 22 Kan. 477; from death to imprisonment for life, Shepherd v. People, 25 N. Y. 406; contra, Com. v. Wyman, 12 Cush. (Mass.) 237; Com. v. Gardner, 11 Gray (Mass.) 438; from death to imprisonment for life or death, in discretion of jury, Marion v. State, 16 Neb. 349, 20 N. W. 289; reducing rate per diem allowed convict working out fine, Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145; reducing maximum, and adding minimum, fine and imprisonment, Flaherty v. Thomas, 12 Allen (Mass.) 428; Com. v. McDonough, 13 Allen (Mass.) 581; changing from imprisonment to fine or imprisonment, State v. McDonald, 20 Minn. 136 (Gil. 119); changing character of imprisonment and mode of executing death sentence, In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; People v. McNulty (3 Cal. Unrep. 441), 28 Pac. 816; changes of mode not affecting substantial rights of prisoner, In re Tyson, 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472; Holden v. Minnesota, 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734. Statutes relating to penal administration or prison discipline, even though enhancing the severity of the confinement, are not objectionable. Murphy v. Com., 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266. Indeterminate sentence law not ex post facto. Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322.

A statute is not ex post facto which imposes an increased punishment for second offense where first offense was committed before its enactment. McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; Com. v. Marchand, 155 Mass. 8, 29 N. E. 578; Com. v. Graves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Rand v. Com., 9 Grat. (Va.) 738; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; In re Kline, 6 Ohio Cir. Ct. R. 215. Nor is law ex post facto changing from imprisonment for not less than two nor more than ten years to a term not to exceed ten years. People v. Hayes, 70 Hun, 111, 24 N. Y. Supp. 194.

rules of evidence so that less or different testimony is sufficient to convict than was required when the act was committed.[35] A statute is not within the prohibition if it makes the act a less aggravated crime than when committed, and makes the punishment less severe, or if it merely changes the method of procedure,[36] unless it thereby deprives the ac-

[35] State v. Johnson, 12 Minn. 477 (Gil. 378), 93 Am. Dec. 241, changing the rule requiring direct evidence of both marriages in bigamy, and permitting indirect evidence. See, also, Calder v. Bull, supra; Cummings v. Missouri, 4 Wall. 325, 18 L. Ed. 356.

[36] What is procedure, review of cases, and history of ex post facto clause. Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. Law amending statute of limitations to allow prosecution is ex post facto, State v. Moore, 42 N. J. Law, 208; but law changing court or organization of court is not, State v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; Com. v. Phillips, 11 Pick. (Mass.) 28; State v. Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829; State v. Welch, 65 Vt. 50, 25 Atl. 900; nor is a law changing place of trial, Cook v. U. S., 138 U. S. 183, 11 Sup. Ct. 275, 34 L. Ed. 906; nor where it merely allows attorney's fee in action to abate liquor nuisance, as this pertains to costs and procedure, Farley v. Geisheker, 78 Iowa, 453, 43 N. W. 279, 6 L. R. A. 533; nor changing requirements as to pleadings, Perry v. State, 87 Ala. 30, 6 South. 425; nor limiting jury to determination of facts, instead of being judges of law and facts, Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; nor enlarging class of persons competent as witnesses, Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Mrous v. State, 31 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834; nor changing the qualifications of jurors, Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; nor reducing the number of defendant's peremptory challenges, South v. State, 86 Ala. 617, 6 South. 52; Mathis v. State, 31 Fla. 291, 12 South. 681; nor allowing the state peremptory challenges, Walter v. People, 32 N. Y. 147; nor increasing number, State v. Ryan, 13 Minn. 370 (Gil. 343); nor abolishing indictment by grand jury and substituting information, Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029; State v. Hoyt, 4 Wash. 818, 30 Pac. 1060; In re Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94; but, contra, McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; State v. Kingsly, 10 Mont. 537, 26 Pac. 1066; nor

cused of a substantial right which is vital for his protection.[37]

Construction of Statutes

The rule is that penal statutes are to be construed strictly against the state, and in favor of the accused; but the words must be given their full meaning, and the courts will not strain the context and look for a meaning which may have the effect of declaring the statute of no effect.[38] In construing statutes, the intention of the Legislature is to be sought, and for this purpose the court will consider, not only the act itself, but its preamble, and will also look into similar statutes on the same subject, and particularly into the old law and into the mischief intended to be remedied.[39] All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are construed strictly.[40] In some of the

changing the number of grand jurors, State v. Ah Jim, 9 Mont. 167, 23 Pac. 76.

[37] It was incompetent for the state of Utah on its admission to provide that persons charged with felony committed while it was a territory should be tried by a jury of eight. Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. See, also, Duncan v. Missouri, 152 U. S. 378, 14 Sup. Ct. 570, 38 L. Ed. 485.

[38] U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; U. S. v. Morris, 14 Pet. 475, 10 L. Ed. 543; U. S. v. Hartwell, 6 Wall. 385, 18 L. Ed. 830; Gibbons v. People, 33 Ill. 443; STEEL v. STATE, 26 Ind. 82, Mikell Illus. Cas. Criminal Law, 17; People v. Plumsted, 2 Mich. 465; People v. Reynolds, 71 Mich. 343, 38 N. W. 923; People v. Reilly, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47; State v. Lovell, 23 Iowa, 304; Keller v. State, 11 Md. 536, 69 Am. Dec. 226; Road Commission v. Haring, 55 N. J. Law, 327, 26 Atl. 915; In re Coy (C. C.) 31 Fed. 800; In re McDonough (D. C.) 49 Fed. 300.

[39] Gibbons v. People, 33 Ill. 443; State v. Babcock, 21 Neb. 599, 33 N. W. 247; State v. Sherman, 46 Iowa, 415; People v. Plumsted, 2 Mich. 465; People v. McKinney, 10 Mich. 54.

[40] See following section and cases cited.

states there are statuory provisions as to construction of statutes.[41]

Common Law in Connection with Statutes.

In all of the states statutes have been passed defining and punishing particular crimes, and the question arises as to what effect this has on the common law. Sometimes the statute merely declares what was already the common law. In this case all the rules and decisions under the common law are applicable. Again, a statute may change the common law by prescribing new elements as essential to constitute the crime, or by rendering unnecessary certain elements which the common law required. In such case, of course, the statute is to control, but it is to be strictly construed. Statutes in derogation of the common law cannot be extended beyond their express provisions. A statute creating a crime in general terms, while it may supersede the common law as to the definition of the crime, will be construed in connection with the common-law exemptions from responsibility of persons not having at the time of committing the act the criminal intent required by the common law, such as infants, insane persons, married women, and persons under necessity or under mistake of fact.[42] So, also, a general statute, containing nothing to show a contrary intent on the part of the Legislature, must be construed in reference to the common law as to principals and accessaries.[43] A statute may also prohibit an act or impose

[41] Pen. Code Minn. § 9, abolishes the rule, as to the Code, that a penal statute is to be strictly construed.

[42] Bish. St. Crimes, § 131 et seq.; Rex v. Groombridge, 7 Car. & P. 582; Wilbur v. Crane, 13 Pick. (Mass.) 289, 290; Com. v. Knox, 6 Mass. 76; State ex rel. Johnson v. Martindale, 1 Bailey (S. C.) 163; Duncan v. State, 7 Humph. (Tenn.) 148.

[43] COM. v. CARTER, 94 Ky. 527, 23 S. W. 344, Mikell Illus. Cas. Criminal Law, 18; Bish. St. Crimes, §§ 135, 136, 139.

a public duty without prescribing any punishment or mode of procedure for its violation, and in such a case the common-law punishment and procedure by indictment apply.[44] Any attempt to commit a crime being a misdemeanor at common law, where a statute defines a crime, but makes no provision for attempts, an attempt to commit the crime is punishable under the common law, provided, however, that the subject of attempts is not entirely regulated by statute. In all cases, however, the plain and express terms of a statute must control. The rule is that, unless there is a repugnancy between the statute and the common law, the latter is not repealed,[45] and there are numerous cases where an indictment defectively drawn under a particular statute has been held good as a common-law indictment. But a statute punishing an act which was a crime at common law, and covering the whole subject, supersedes, and by necessary implication repeals, the provisions of the common law on the same subject.[46] Where a statute merely punishes a crime, calling it by name, but not defining it, the common law supplies the definition.[47]

[44] 1 Bl. Comm. 122; Com. v. Chapman, 13 Metc. (Mass.) 68; State v. Fletcher, 5 N. H. 257; Keller v. State, 11 Md. 525, 69 Am. Dec. 226.

[45] Shannon v. People, 5 Mich. 71; State v. Pulle, 12 Minn. 164 (Gil. 99). But the Legislature may extend the common-law definition of a particular offense so as to include acts not punishable at common law, and not embraced within the common-law definition. People v. Most, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458.

[46] COM. v. COOLEY, 10 Pick. (Mass.) 37, Mikell Illus. Cas. Criminal Law, 19.

[47] Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Pitcher v. People, 16 Mich. 142; Benson v. State, 5 Minn. 19 (Gil. 6); U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Smith v. State, 58 Neb. 531, 78 N. W. 1059.

Same—Penal Codes

Many of the states have adopted penal or criminal codes, the purpose of which is to define what acts shall be punished as crimes. In some of them the code is intended to cover the whole law, and no act is a crime unless it is expressly declared so.[48] In others the code does not entirely abrogate the common law in so far as it makes acts crimes, but merely abrogates it as to the acts expressly prohibited, leaving the common law where it is not so supplanted still in force.[49] Thus, in Ohio and Iowa, it is held that there are no common-law crimes; that no act, however injurious, is a crime unless it is expressly prohibited by statute;[50] and it was held in Ohio that a man who attempted to have carnal knowledge of a girl under ten years of age, with her consent, was not guilty of a crime, because there was no statute against it;[51] and the Iowa court held sodomy no crime.[52] In Indiana, there is a statute declaring that "crimes and misdemeanors shall be defined, and the punishment thereof fixed, by statutes of this state, and not otherwise."[53] Even in those states, however, which have penal codes, and which do not recognize common-law crimes, the common law is in force to the extent that it may be resorted to for the definition of crimes which are not defined in the statutes prohibiting them.[54]

[48] State v. Shaw, 39 Minn. 153, 39 N. W. 305.

[49] Johnson v. People, 22 Ill. 314; State v. Pulle, 12 Minn. 164 (Gil. 99).

[50] Estes v. Carter, 10 Iowa, 400; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; Allen v. State, 10 Ohio St. 287.

[51] Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355.

[52] Estes v. Carter, 10 Iowa, 400.

[53] Jones v. State, 59 Ind. 229.

[54] State v. Twogood, 7 Iowa, 252; Estes v. Carter, 10 Iowa, 400; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355.

Repeal of Statute—Revival of Former Law

It is a maxim of the common law applicable to the construction of statutes that the simple repeal of a repealing law, not substituting other provisions in place of those repealed, revives the pre-existing law, unless the repealing act or some general statute makes a different rule.[55] Accordingly, an act committed in violation of the pre-existing law and after the repeal of the repealing law may be punished, although, if it were committed before such repeal, it could not be punished, since the pre-existing law would not then be in force.[56]

Municipal Ordinances

Cities and other municipal bodies are generally vested by the Legislature with power to enact ordinances against disorderly houses, gambling houses, and the like, as well as to regulate many other matters for the welfare of the community, for a violation of which a penalty by fine or imprisonment is attached as a punishment. Great diversity of opinion exists as to whether acts in violation of municipal ordinances are crimes. By many courts it is held or declared that they are not crimes, as not being violations of public law.[57] By a few courts it is held that they are crimes, being breaches of law established for the protection

[55] Com. v. Churchill, 2 Metc. (Mass.) 118; Com. v. Mott, 21 Pick. (Mass.) 492; U. S. v. Philbrick, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. Ed. 559.

[56] Ante, p. 3.

[57] City of Greeley v. Hamman, 12 Colo. 94, 20 Pac. 1; State v. Rouch, 47 Ohio St. 478, 25 N. E. 59; City of Oshkosh v. Schwartz, 55 Wis. 487, 13 N. W. 552; CITY OF KANSAS v. CLARK, 68 Mo. 588, Mikell Illus. Cas. Criminal Law, 21; Kansas City v. Neal, 122 Mo. 232, 26 S. W. 695; State v. Heuchert, 42 La. Ann. 270, 7 South. 329; State v. Bonell, 42 La. Ann. 1110, 8 South. 299, 10 L. R. A. 60, 21 Am. St. Rep. 413. And see case cited note 63, infra.

of the public, as distinguished from infringements of private rights.[58] "A municipal ordinance is as much a law for the protection of the public as a criminal statute of the state, the only difference being that the one is designed for the protection of the municipality and the other for the protection of the whole state; and in both cases alike the punishment is imposed for a violation of a public law. If the state itself directly should make the act an offense, and prescribe the punishment, there could be no question that the act would be a 'crime' and the prosecution a 'criminal prosecution'; * * * and how can it make any difference, either in the intrinsic nature of the thing or in the consequences to the accused, whether the state does this itself or delegates the power to pass the law to the municipal authorities?"[59] The decision of the question has sometimes turned on the construction of the peculiar language of the Constitution or of a statute.[60]

The question has frequently been considered in cases involving the right of the accused to a trial by jury, but denial of the right does not necessarily involve a determination that the offense is not criminal, since at common law a person accused of a petty offense of this nature, of which justices of the peace and police magistrates had jurisdiction, had no right to a trial by jury; and it is generally held that the constitutional guaranty is no broader than the common-law

[58] STATE v. WEST, 42 Minn. 147, 43 N. W. 845, Mikell Illus. Cas. Criminal Law, 23; Jaquith v. Royce, 42 Iowa, 406; State v. Vail, 57 Iowa, 103, 10 N. W. 297; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

[59] Per Mitchell, J., in STATE v. WEST, supra. But see State v. Robitshek, 60 Minn. 123, 125, 61 N. W. 1023, 33 L. R. A. 33.

[60] Bish. New Cr. Law, § 32. "Crime," as used in the Code of Criminal Procedure, does not include petty offenses subject to summary convictions by a magistrate. Steinert v. Sobey, 14 App. Div. 505, 44 N. Y. Supp. 146.

right.[61] Again, the question has been much considered in cases involving the determination of whether the constitutional provisions against double jeopardy apply to prevent two prosecutions for the same act, the one in violation of a municipal ordinance prohibiting it, and the other under a state statute. If the offense against the ordinance is a criminal offense, it would follow logically that the same act may not be punished under both ordinance and statute; and there are decisions to that effect.[62] The opposite conclusion, however, has more frequently been reached; the two offenses being declared to be distinct.[63]

[61] STATE v. WEST, supra; City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; State v. Glenn, 54 Md. 573; State v. Conlin, 27 Vt. 318; Byers v. Com., 42 Pa. 89; McGear v. Woodruff, 33 N. J. Law, 213; People v. Justices of Court of Special Sessions, 74 N. Y. 406; Inwood v. State, 42 Ohio St. 186; Wong v. Astoria, 13 Or. 538, 11 Pac. 295.

[62] State v. Thornton, 37 Mo. 360; Hankins v. People, 106 Ill. 628.

[63] Ambrose v. State, 6 Ind. 351; Levy v. State, 6 Ind. 281; State v. Lee, 29 Minn. 445, 13 N. W. 913; State v. Fourcade, 45 La. Ann. 717, 13 South. 187, 40 Am. St. Rep. 249; State v. Clifford, 45 La. Ann. 980, 13 South. 281; State v. Stevens, 114 N. C. 873, 19 S. E. 861; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; Koch v. State, 53 Ohio St. 433, 41 N. E. 689; City of Yankton v. Douglass, 8 S. D. 441, 66 N. W. 923; Ex parte Hong Shen, 98 Cal. 681, 33 Pac. 799; State v. Gustin, 152 Mo. 108, 53 S. W. 421.

CHAPTER III

CLASSIFICATION OF CRIMES

7. How Classified.
8. Treason.
9–10. Felonies and Misdemeanors.
11–12. Merger of Offenses.

HOW CLASSIFIED

7. Crimes, at common law, are divided into—

(a) Treason.

(b) Felonies, and

(c) Misdemeanors.

TREASON

8. In this country treason can consist only in levying war against the United States, or a particular state, or in adhering to their enemies, giving them aid and comfort.

Under the old English common law, treason was divided into high and petit treason, the former consisting in certain acts against the sovereign, and the latter in the murder of a superior by an inferior; that is, of a husband by his wife, a master by his servant, or a lord or ordinary by an inferior ecclesiastic.[1] There is no longer such a crime as petit treason, the offense being regarded simply as homicide. With us the crime of treason is expressly defined by the federal constitution, which declares that "treason against the United States shall consist only in levying war against

[1] 4 Bl. Comm. 75.

them, or in adhering to their enemies, giving them aid and comfort";[2] and there are similar provisions in the state constitutions. Treason is a specific crime, and will be so treated hereafter.[3]

FELONIES AND MISDEMEANORS

9. "Felony is any offense which by the statutes or by the common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods, or both, or which a statute expressly declares to be such."[4] In some states, the statutes expressly declare all crimes to be felonies which are punishable by death or by imprisonment in the state prison.

10. All crimes less than felonies are misdemeanors.

A felony at common law was any crime which occasioned the forfeiture of lands and goods. This was usually accompanied by capital punishment, though not always;[5] but, as capital punishment was usually inflicted, felonies came to include all crimes punishable by death.[6] Forfeiture of lands and goods as a punishment for crime is now abolished. Felony is now generally defined by statute, either in general terms or by a specific declaration accompanying the definition of the crime. In states where there is no general statutory definition of the term, and no accompanying declara-

[2] Const. U. S. art. 3, § 3, cl. 1. [3] Post, p. 469.

[4] 1 Bish. New Cr. Law, § 615; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550; Com. v. Schall, 12 Pa. Co. Ct. R. 554.

[5] Suicide was felony. Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109. So excusable homicide, being accompanied by forfeiture, was a felony.

[6] 4 Bl. Comm. 94.

tion to determine whether the given crime is a felony or a misdemeanor the courts look to the history of the particular offense, and ascertain whether it was a felony at common law, and this although the punishment may be imprisonment, and not death.[7]

In many states statutes have been enacted declaring all offenses to be felonies which are punishable by death or by imprisonment in the state prison.[8] Under these statutes, a crime is a felony if it may be punished by imprisonment in the state prison, though it may lie within the discretion of the court or jury to inflict a less punishment,[9] and even though a less punishment is in fact imposed.[10] Where a statute provides that one who violates its provisions shall be deemed to have "feloniously" committed the act, the offense is thereby made a felony; and so, also, if it provides for punishing accessaries, as there can be accessaries in felonies only.[11]

[7] 1 Bish. New Cr. Law, § 616; State v. Dewer, 65 N. C. 572. Cf. Com. v. Newell, 7 Mass. 245. In the absence of a statute defining "felony" the word is used to designate such serious offenses as were formerly punished by death, or by forfeiture of lands or goods. Bannon v. U. S., 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494.

[8] Drennan v. People, 10 Mich. 169; State v. Smith, 8 Blackf. (Ind.) 489; Nichols v. State, 35 Wis. 308; Smith v. State, 33 Me. 48, 54 Am. Dec. 607. Under Code N. C. § 1097, providing that for misdemeanors done with deceit and intent to defraud the offender may be punished by imprisonment in the penitentiary, and a later act making all offenses so punishable felonies, a conspiracy to cheat and defraud, being committed with deceit and so punishable, is a felony. State v. Mallett, 125 N. C. 718, 34 S. E. 651.

[9] Ingram v. State, 7 Mo. 293; State v. Smith, 32 Me. 369, 54 Am. Dec. 578; People v. War, 20 Cal. 117; People v. Park, 41 N. Y. 21; People v. Lyon, 99 N. Y. 210, 1 N. E. 673; Randall v. Com., 24 Grat. (Va.) 644; State v. Harr, 38 W. Va. 58, 17 S. E. 794. Contra, Lamkin v. People, 94 Ill. 501.

[10] People v. Hughes, 137 N. Y. 29, 32 N. E. 1105; Benton v. Com., 89 Va. 570, 16 S. E. 725; State v. Melton, 117 Mo. 618, 23 S. W. 889.

[11] Com. v. Barlow, 4 Mass. 439; Com. v. Macomber, 3 Mass. 254.

Importance of Distinction

The distinction between felonies and misdemeanors is an important one, though you will see statements to the contrary in some of the books. Though the distinction between felonies and misdemeanors as to punishment has been abolished in the abolition of attainder and forfeiture for crime, other important distinctions remain. Thus: (1) In felonies there may be accessaries, while in misdemeanors all participants are considered principals.[12] (2) An arrest is justifiable in case of felonies where it would not be in case of a misdemeanor.[13] (3) A killing may be justifiable in preventing, or in effecting an arrest for, a felony, which would not be justifiable in case of a misdemeanor.[14] (4) In some jurisdictions a prosecution for a felony must be by indictment, while prosecutions for misdemeanors may be by information or complaint.[15] (5) An indictment may be invalid for a felony which would be sufficient for a misdemeanor.[16] (6) A defendant has rights as to peremptory challenge of jurors on trial for a felony which he has not on trial for misdemeanor.[17] (7) On trial for a felony, the defendant must be present throughout the trial, while this is not the case on trial for a misdemeanor.[18]

[12] Post, p. 109.

[13] Post, pp. 176, 223.

[14] Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; Handley v. State, 96 Ala. 48, 11 South. 322, 38 Am. St. Rep. 81; State v. Smith, 127 Iowa, 534, 103 N. W. 944, 70 L. R. A. 246, 109 Am. St. Rep. 402, 4 Ann. Cas. 758; Carr v. State, 43 Ark. 99; U. S. v. Rice, 1 Hughes, 560, Fed. Cas. No. 16,153.

[15] Clark, Cr. Proc. 107.

[16] State v. Edwards, 19 Mo. 674; McCearley v. State, 97 Miss. 556, 52 South. 796.

[17] Clark, Cr. Proc. 449.

[18] Clark, Cr. Proc. 423.

MERGER OF OFFENSES

11. As a rule, at common law, where a person by the same act commits two crimes, one a felony and the other a misdemeanor, the misdemeanor merges in the felony; but if the crimes are of the same degree, both felonies or misdemeanors, there is no merger.[19]

12. In some states this doctrine has not been recognized, while in most states it has been abolished by statutes allowing conviction of a less offense than is charged in the indictment if it is included in the offense charged.

At common law, on an indictment for felony, there could be no conviction for a misdemeanor, although the offense charged necessarily included the lesser offense.[20] Thus there could be no conviction of simple assault, or of assault with intent to kill or to commit rape (where such aggravated assault was a misdemeanor), on an indictment for murder or manslaughter or for rape.[21] So conspiracy to commit a crime is only a misdemeanor at common law, and where the conspiracy is to commit a misdemeanor only it is not merged in the completed crime; but it is otherwise if the conspiracy is to commit a felony, and the felony, is ac-

[19] 1 Bish. New Cr. Law, §§ 787, 788, 804, et seq.

[20] 1 Chit. Cr. Law, 251; 2 Hawk, P. C. c. 47, § 8; Rex v. Westbeer, 1 Leach, 14, 2 Strange, 1133; Rex v. Monteth, 2 Leach, 702; 2 East, P. C. 737, 738; Com. v. Roby, 12 Pick. (Mass.) 496; Com. v. Gable, 7 Serg. & R. (Pa.) 423; Black v. State, 2 Md. 376; Barber v. State, 50 Md. 161. In most of these states the rule has been changed by statute.

[21] Com. v. Roby, supra; Com. v. Cooper, 15 Mass. 187; Com. v. Newell, 7 Mass. 249.

tually committed.[22] The so-called "doctrine of merger" rested on the reason that persons indicted for misdemeanor had certain advantages at the trial—such as the right to make a full defense by counsel, to have a copy of the indictment, and to have a special jury—privileges not accorded to a person indicted for felony.[23] The reason for the rule does not exist in the United States, there being no privileges to which the defendant is entitled on a trial for misdemeanor to which he is not entitled on a trial for felony; and many courts have consequently refused to recognize the doctrine that there cannot be a conviction for misdemeanor on indictment for felony.[24] In many states the rule has been changed by statutes which provide that on an indictment, if the proof falls short of the offense charged, but so much of it as constitutes a substantive offense is proved, the defendant may be convicted of any lesser offense included in the offense charged.[25] And it is generally held that when the act charged is a constituent part of some higher offense he cannot object upon conviction that the evidence shows that

[22] State v. Murray, 15 Me. 100; State v. Mayberry, 48 Me. 218; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Com. v. Kingsbury, 5 Mass. 106 (according to obiter dictum in this case, conspiracy also merges in misdemeanor); People v. Mather, 4 Wend. (N. Y.) 229, at page 265, 21 Am. Dec. 122; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; State v. Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121; Com. v. Blackburn, 1 Duv. (Ky.) 4; State v. Noyes, 25 Vt. 415; Berkowitz v. U. S., 35 C. C. A. 379, 93 Fed. 452.

[23] See Clark, Cr. Proc. 358; Whart. Cr. Law, § 279.

[24] People v. Jackson, 3 Hill (N. Y.) 92; State v. Scott, 24 Vt. 127; State v. Shepard, 7 Conn. 54; State v. Johnson, 30 N. J. Law, 185; Hunter v. Com., 79 Pa. 503, 21 Am. Rep. 83; People v. Chalmers, 5 Utah, 201, 14 Pac. 131; Herman v. People, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182.

[25] See Com. v. Drum, 19 Pick. (Mass.) 479; Hill v. State, 53 Ga. 125; State v. Purdie, 67 N. C. 326; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; State v. Kyne, 86 Iowa, 616, 53 N. W. 420; State v. Mueller, 85 Wis. 203, 55 N. W. 165.

he is guilty of the higher offense.[26] In some states it is provided by statute that an indictment for a misdemeanor may be sustained by proof of a felony in which the misdemeanor is included.[27]

[26] State v. Vadnais, 21 Minn. 382; Com. v. Burke, 14 Gray (Mass.) 100; Com. v. Walker, 108 Mass. 309; Com. v. Creadon, 162 Mass. 466, 38 N. E. 1119; State v. Keeland, 90 Mo. 337, 2 S. W. 442; State v. Grant, 86 Iowa, 216, 53 N. W. 120. But in New York a conspiracy to commit a felony, when executed, merges in the felony, and a prosecution for the felony will not lie. People v. McKane, 7 Misc. Rep. 478, 28 N. Y. Supp. 397; People v. Thorn, 21 Misc. Rep. 130, 47 N. Y. Supp. 46. See, also, People v. Wicks, 11 App. Div. 539, 42 N. Y. Supp. 630; People v. McKane, 143 N. Y. 455, 38 N. E. 950.

[27] People v. Arnold, 46 Mich. 268, 9 N. W. 406; People v. Petheram, 64 Mich. 252, 31 N. W. 188.

CHAPTER IV

THE MENTAL ELEMENT IN CRIME

13. Criminal Intent.
14. Motive Not Intent.
15. General Intent—Intent Presumed from Act.
16. Specific Intent.
18. Constructive Intent.
19. Intent in Cases of Negligence.
20. Concurrence of Act and Intent.

CRIMINAL INTENT

13. Every common-law crime consists of two elements—the criminal act or omission, and the mental element, commonly called "criminal intent."

It is a principle of the criminal law that ordinarily a crime is not committed if the mind of the person doing the act in question is innocent. "Actus non facit reum, nisi mens sit rea," is a maxim of the criminal law.[1] Hence it is said that every crime, at least at common law, consists of two elements—the criminal act or omission, and the mental element, commonly called "criminal intent." The necessity for a guilty mind or criminal intent does not mean that it is necessary that the person doing the prohibited act be conscious that it is wrong, for ignorance of the law is no excuse.[2] It is true, indeed, that most, if not all, acts which are criminal at common law are mala in se, and hence that to a greater or less extent the voluntary commission of the act presupposes a guilty mind. Yet in the case of some of

[1] Reg. v. Tolson, 23 Q. B. Div. 168, 172; Chisholm v. Doulton, 22 Q. B. Div. 736.

[2] Post, p. 87.

the minor common-law offenses it can hardly be said that the commission of the act presupposes any such state of mind, except in a purely technical sense; and, if the act is prohibited, the bare intention to commit it is enough to supply the requisite mental element. Again, it is true that at common law ignorance or mistake of fact as a rule exempts from criminal liability if the act done would have been lawful had the facts been as the actor believed; the element of a guilty mind being in such case absent. Yet by statute many acts wrong only because prohibited are made criminal, to which this rule does not apply, it being competent for the Legislature to define a crime in such a way as to make the existence of a guilty mind immaterial.[8]

"Malice," although the word is also used in a restricted sense in the definition of particular crimes, such as murder and malicious mischief, is often used synonymously with "criminal intent." Both terms, by reason of the broader meaning given to them in ordinary language, are somewhat misleading. The voluntary doing of an unlawful act is ordinarily sufficient ground on which to raise the presumption of intent, both as to that act and as to any criminal act which is the natural result; and if a man, while acting with a view to one crime, commits another criminal act, which he did not intend, he may frequently be punished for the latter act as a crime. Again, the mental elements of different crimes differ widely; and since a man may be criminally liable for mere negligence, it is even possible for absence of mind to constitute, or to supply the place of, criminal intent. Indeed, having in view the diverse states of mind which in different crimes are sufficient to constitute the mental element, it is hardly possible to define criminal intent more narrowly than by saying that it is the partic-

[8] Post, p. 91.

ular state of mind, differing in different crimes, which, by the definition of the particular crime, must concur with the criminal act.[4]

MOTIVE NOT INTENT

14. Motive is not an essential element of crime. A bad motive will not make an act a crime, nor will a good motive prevent an act from being a crime. Motive may, however, tend to show that an act was willful, and done with a criminal intent.

Motive is that which incites or stimulates a person to do an act.[5] Thus the motive may be the desire to injure or to

[4] "The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed. * * * Though this phrase ['Non est reus, nisi mens sit rea'] is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following ground: It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a mens rea, or 'guilty mind,' which is always expressly or by necessary implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. Mens rea means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory, indeed, to describe a mere absence of mind as 'mens rea' or 'guilty mind.' The expression, again, is likely to mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; that immorality is essential to crime." Per Stephen, J., in Reg. v. Tolson, supra. Cf. People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, per Cooley, C. J.

[5] "Intent is, in its legal sense, the purpose to use a particular means

benefit. Motive is never an essential element in a crime, and therefore one may be convicted of a crime though no motive is proven.[6] A good motive does not prevent an act from being a crime. If a father drown his child to save it from starving, he is guilty of homicide, though he was actuated by a good motive—love for the child.[7] So a parent who neglects to provide medical aid for a dependent child, in disobedience of a statute, cannot excuse himself on the ground that he was actuated in such refusal by religious motives.[8] On the other hand, the law does not punish a bad motive. The motive which prompts an act, however bad it may be, does not make the act a crime if the act in itself is not a crime. It was so held where a person obtained goods by making representations which he believed to be false, and which he made with intent to defraud, but which, fortunately for him, turned out to be true.[9] The motive for doing an act may, however, tend to show that the

to effect a certain result. Motive is the reason which leads the mind to desire that result." Dodge, J., in Baker v. State, 120 Wis. 145, 97 N. W. 570. "Intent is the result of deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act of volition." 2 Steph. Hist. Crim. L. 110.

[6] State v. Coleman, 20 S. E. 441; Thurman v. State, 32 Neb. 224, 49 N. W. 338.

[7] People v. Kirby, 2 Parker, Cr. R. (N. Y.) 28.

[8] Reg. v. Morley, 8 Q. B. Div. 571; Reg. v. Downes, 13 Cox, Cr. Cas. 111. See, contra, the prior case of Reg. v. Wagstaffe, 10 Cox, Cr. Cas. 530. Removal of mother's corpse from Dissenters' burial ground, from filial affection and sense of religious duty. Reg. v. Sharpe, 7 Cox, Cr. Cas. 214. Jew violating Sunday law. Com. v. Has, 122 Mass. 40. Belief of father who kills his child that it will be better off. People v. Kirby, 2 Parker, Cr. R. (N. Y.) 28. Sending obscene literature through the mails to correct abuses in sexual intercourse. U. S. v. Harmon (D. C.) 45 Fed. 414. Polygamy under religious belief that it is right. Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. See, also, State v. White, 64 N. H. 48, 5 Atl. 828.

[9] State v. Asher, 50 Ark. 427, 8 S. W. 177.

act was committed willfully or premeditatedly, or to prove the intent with which it was committed; and, although it is never essential to prove motive, it may always be proved for this purpose.[10] So, also, motive may be proved as tending to show that the accused did the act charged, especially where the evidence connecting him with the crime is circumstantial.[11]

GENERAL INTENT—INTENT PRESUMED FROM ACT

15. Where an act is prohibited on pain of punishment, intention on the part of one capable of entertaining intent, and acting without justification or excuse, to do the act, constitutes criminal intent. In such case the existence of the intent is presumed from commission of the act, on the ground that a person is presumed to intend his voluntary acts and their natural and probable consequences.

The intent which is necessary to the commission of a crime does not necessarily involve an intention to do a known criminal act; but intention to do a criminal act is ordinarily sufficient to constitute criminal intent. In other words, where an act is prohibited on pain of punishment, criminal intent is nothing more than intention to do the act, provided the wrongdoer is a person capable of entertaining criminal intent, and acts without justification or excuse. This is because a man who voluntarily does an act is by law presumed to have intended to do the act, and also to

[10] Com. v. Hudson, 97 Mass. 565. See Clark, Cr. Proc. 507–509, and cases cited.

[11] SCHMIDT v. U. S., 133 Fed. 257, 66 C. C. A. 389, Mikell Illus. Cas. Criminal Law, 26.

have intended the natural and ordinary consequences of his act.[12] Thus, if a man strikes another with a deadly weapon, and kills him, he is presumed to have intended to kill him; if he throws a deadly missile into a crowded street, and thereby kills another, he is presumed to have intended to kill him; if he administers poison, and death results, he is presumed to have intended that result; if the selling of oleomargarine is absolutely forbidden, irrespective of intent, the mere act of selling constitutes the crime, without proof even that the seller knew it was oleomargarine.[13] On the other hand, a man is not presumed to have intended that which is not the natural result of his act. Thus it was held that there could be no conviction for homicide on evidence that the accused, with his fist, knocked down a man, who was thereupon kicked by a horse and killed.[14] Such cases are to be distinguished from those which hold that the accused is none the less responsible for the death of a person whom he has injured although the injured person might have prevented the fatal result by proper care,[15] such neglect being itself deemed an ordinary and natural consequence of the injury inflicted.[16]

[12] Rex v. Sheperd, Russ. & R. 170; Reg. v. Doherty, 16 Cox, Cr. Cas. 306; Com. v. Hersey, 2 Allen (Mass.) 173; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; State v. Welch, 21 Minn. 22; State v. Huff, 89 Me. 521, 36 Atl. 1000; Curtis v. State, 118 Ala. 125, 24 South. 111.

[13] See post, p. 91.

[14] People v. Rockwell, 89 Mich. 503. Cf. Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

[15] Post, p. 169.

[16] Com. v. Hackett, 2 Allen (Mass.) 136.

SPECIFIC INTENT

16. When a crime consists, not merely in doing an act, but in doing it with a specific intent, the existence of that intent is an essential element. In such case the existence of criminal intent is not presumed from the commission of the act, but the specific intent must be proved.

On the other hand, many crimes consist not merely in doing an act, but in doing that act with a specific intent; and the same act may constitute different crimes when done with different intents. When, by the common law or by statute, a specific intent is essential to a crime, the specific intent must exist, or the accused cannot be convicted of the particular crime; nor, in this class of case, can the intent be presumed from the mere commission of the act, but it must be expressly proved. Thus burglary is defined as breaking and entering a dwelling house of another in the nighttime with intent to commit a felony therein; consequently, if the proof fails to establish the intent to commit a felony, but shows instead an intent to commit a lawful act, or a mere misdemeanor, the crime is not established.[17] So an attempt to commit a crime is itself an offense, but, in order to convict, it must be shown that there was an act done with the specific intent to commit the crime charged as having been attempted.[18] So where a man is charged with assault with intent to commit another crime, as murder or rape, the intent to commit that particular crime must

[17] Dobb's Case, 2 East, P. C. 513; Rex v. Knight, 2 East, P. C. 510; STATE v. MOORE, 12 N. H. 42, Mikell Illus. Cas. Criminal Law, 155; Harvick v. State, 49 Ark. 514, 6 S. W. 19. Post, p. 302.

[18] Post, pp. 138, 148.

be proved.[19] Again, to constitute the crime of malicious mischief, the mere willful infliction of injury is not enough, but that peculiar state of mind which constitutes "malice" must be shown.[20] Other illustrations of the nature of specific intent will be found under the discussions of particular offenses. It is true that in some cases where the gist of the offense consists in the intent, the inference that every man intends the natural and necessary consequences of his acts is entitled to weight, yet such inference is not conclusive. The accused will still be allowed to show, if he can, that he did not in fact have the specific intent necessary to constitute the crime charged. Thus, where, on an information for assault with intent to do great bodily harm less than murder, it appeared that such harm was committed by shooting, it was held that, although the presumption arising from the act was an important circumstance in making the proof necessary to show the intent, it was not conclusive, nor alone sufficient, and should be supplemented by other testimony to avoid a reasonable doubt.[21]

[19] Carter v. State, 28 Tex. App. 355, 13 S. W. 147; State v. Butman, 42 N. H. 490; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; Reg. v. Boyce, 1 Moody, Cr. Cas. 29. Post, pp. 259, 260.

[20] REG. v. PEMBLITON, 12 Cox, Cr. Cas. 607, Mikell Illus. Cas. Criminal Law, 28; Reg. v. Faulkner, 13 Cox, Cr. Cas. 550; Com. v. Walden, 3 Cush. (Mass.) 558.

[21] People v. Sweeney, 55 Mich. 586, 22 N. W. 50. See, also, Com. v. Hersey, 2 Allen (Mass.) 173; Scott v. State, 60 Tex. Cr. R. 318, 131 S. W. 1072. A charge that defendant committed an assault upon B., with intent to kill the said B., is sustained by proof that the assault was made on B. with intent to kill X. State v. Gallegher, 88 N. J. Law, 321, 85 Atl. 207.

CONSTRUCTIVE INTENT

17. Where a person engaged in the commission of a crime that is malum in se does an act unintended by him, the intent to commit the crime in which he was engaged is carried over to the act done, and supplies the intent necessary to make the act done a crime. The intent in such case is called "constructive intent."

18. Constructive intent will not supply specific intent.

Constructive Intent—Results not Intended

It is not essential to the constitution of a crime that the accused should commit the very act intended by him. Where a man does one wrongful act while actually intending to do another, he may be criminally liable for the latter act. The actual criminal intent, or guilty mind, concurring with the act actually done, is enough to constitute it a crime. The intent in such cases is called "constructive intent." Thus, if a man shoot at a fowl with intent to steal it, and accidentally kill a man, he is guilty of homicide;[22] and where several persons co-operate to rob, and while pursuing their object the person assailed is killed, all are guilty of the homicide.[23] So, also, one who attempts to commit suicide, which is a criminal act, and accidentally shoots a person trying to prevent him from taking his life, is guilty of manslaughter at least, if not of murder.[24] It has even been held that one who attempts to commit rape, and takes

[22] 1 East, P. C. 265.

[23] State v. Barrett, 40 Minn. 77, 41 N. W. 463, post, p. 103.

[24] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

money offered him by the woman, is guilty of robbery.[25] It is generally held, however, that to render one criminally liable for unintended results, the crime in which he was engaged must be malum in se, and not merely malum prohibitum. If one in driving at a rate of speed which is not negligent, run over another, he is not liable for criminal assault and battery or homicide, merely because his speed is greater than is allowed by a city ordinance.[26] One is not guilty of homicide who, while hunting in violation of a statute, accidentally kills another;[27] nor is one guilty of manslaughter who accidentally kills another in showing him a pistol which the accused was carrying contrary to a statute.[28]

[25] 2 East, P. C. 711. See, also, Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496.

[26] COM. v. ADAMS, 114 Mass. 323, 19 Am. Rep. 362, Mikell Illus. Cas. Criminal Law, 30; State v. Collingsworth, 82 Ohio St. 154, 92 N. E. 22, 28 L. R. A. (N. S.) 770, 137 Am. St. Rep. 775. But see Hayes v. State, 11 Ga. App. 371, 75 S. E. 523. A fortiori, if a mere civil wrong. Reg. v. Franklin, 15 Cox, Cr. Cas. 163.

[27] State v. Horton, 139 N. C. 588, 51 S. E. 945, 1 L. R. A. (N. S.) 991, 111 Am. St. Rep. 818, 4 Ann. Cas. 797; Estell v. State, 51 N. J. Law, 182, 17 Atl. 118.

[28] Potter v. State, 162 Ind. 213, 70 N. E. 129, 64 L. R. A. 942, 102 Am. St. Rep. 198, 1 Ann. Cas. 32. But under a statute making the intentional pointing of a deadly weapon at another a misdemeanor, one who intentionally pointed a pistol at another and thereby caused his death was held guilty of homicide, though the killing was accidental. State v. Reese, 2 Boyce (Del.) 434, 79 Atl. 217. Where a person attacks another with a deadly weapon, without a deliberate and premeditated intent to take life, but only intending to inflict great bodily harm, it has been held that, as such attack was a felony, if the person attacked was killed by the blow, it was a killing done in the commission of a felony, and hence murder in the first degree. State v. Nueslein, 25 Mo. 126. The contrary was held in People v. Spohr, 206 N. Y. 516, 100 N. E. 444. In the latter case the court said: "To constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we

Same—Specific Intent

The doctrine of constructive intent does not apply, however, where a specific intent is necessary to constitute a particular crime. Constructive intent will not supply specific intent. Thus, under a statute enacting that any person who shall unlawfully and "maliciously" commit any damage to property, which was construed as meaning that the act must be willfully and intentionally done, it was held that an indictment for unlawfully and maliciously breaking a window was not sustained by evidence that the accused threw a stone at people he had been fighting with, intending to strike one or more of them, but not to break the window; although it was intimated that, had the accused thrown the stone recklessly, knowing there was a window near, which it might probably hit, the conviction might have been sustained on the principle that a man must be taken to intend the natural and probable consequences of his act.[29] Such cases are to be distinguished from others in which, although the criminal act resulting was not intended, the requisite specific intent was yet present when the act was done. Thus, under a statute declaring that whoever shall "unlawfully and maliciously" wound "any person" shall be guilty of a misdemeanor, it was held that a man who, unlawfully and maliciously intending to wound one person, in fact accidentally wounded another, was

think that, while the violence may constitute a part of the homicide, yet the other elements constituting the felony in which he is engaged must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder." The distinction between acts mala in se and mala prohibita was repudiated in State v. Stanton, 37 Conn. 421.

[29] REG. v. PEMBLITON, 12 Cox, Cr. Cas. 607, Mikell Illus. Cas. Criminal Law, 28. See, also, Reg. v. Faulkner, 13 Cox, Cr. Cas. 550; State v. Mitchell, 27 N. C. 350.

guilty.[80] So, if a man intending to kill A. strikes B. believing that he is A., the specific intent to strike the person actually struck is sufficient to sustain an indictment for assault with intent to kill B.[81]

INTENT IN CASES OF NEGLIGENCE

19. In crimes which consist in neglect to observe proper care in performing an act, or in culpable failure to perform a duty, criminal intent consists in the state of mind which necessarily accompanies the negligent act or culpable omission.

In certain crimes the criminal act or omission consists in mere neglect to observe proper caution in the performance of an otherwise lawful act, or in culpable failure to perform a duty imposed by law or by contract, whereby injury results to the public or to an individual. In such cases the criminal intent consists simply in the state of mind which necessarily accompanies such negligent act or culpable omission. In other words, as it is frequently put, in some cases criminal intent may be supplied by negligence.

The question of criminal negligence most frequently arises in connection with manslaughter,[82] although it also arises in connection with nuisance,[83] escape,[84] and some other common-law crimes, as well as with many statutory crimes. The subject will be considered more fully in treating of particular offenses.

[80] Reg. v. Latimer, 17 Q. B. Div. 359.
[81] McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209.
[82] Post, p. 229. [83] Post, p. 398. [84] Post, p. 437.

CONCURRENCE OF ACT AND INTENT

20. To constitute a crime, act and intent must concur.

Not only must there be both an act and an intent to constitute a crime, but the act and intent must concur in point of time.[35] An intent to do a prohibited act, abandoned before the act is done, is not punishable, even though the act should subsequently be committed. If A. should make up his mind to kill B., then give up the intent, and later kill B. in mutual combat, or accidentally, the killing would take no color from the previous intent. So, on the other hand, an act done without the intent necessary to make that act a particular crime will not constitute that crime, though the necessary intent be later entertained. Thus, the crime of burglary, which consists in breaking and entering with intent to commit a felony, is not committed if the intent to commit a felony is first conceived after the entry.[36] So one is not guilty of larceny who takes the property of another innocently, though he subsequently decides to keep it after discovering the true owner;[37] nor does a principal make himself criminally liable for the act of his agent by subsequently ratifying the act.[38]

[35] U. S. v. Fox, 95 U. S. 670, 24 L. Ed. 538; Reg. v. Matthews, 12 Cox, Cr. Cas. 489; Reg. v. Thurborn, 3 Cox, Cr. Cas. 453.

[36] STATE v. MOORE, 12 N. H. 42, Mikell Illus. Cas. Criminal Law, 155. Post, p. 302.

[37] Reg. v. Thurborn, 3 Cox, Cr. Cas. 453; Reg. v. Matthews, 12 Cox, Cr. Cas. 489.

[38] Morse v. State, 6 Conn. 9. Cf. Reg. v. Woodward, 9 Cox, Cr. Cas. 95. Post, pp. 128, 129.

CHAPTER V

PERSONS CAPABLE OF COMMITTING CRIME, AND EXEMPTIONS FROM RESPONSIBILITY

21–22. Infancy.
23–27. Insanity.
28–29. Drunkenness.
30–32. Corporations.
33–34. Ignorance or Mistake of Law.
35. Ignorance or Mistake of Fact—Common-Law Offenses.
36. Same—Statutory Offenses.
37. Accident or Misfortune.
38. Justification.
39. Same—Duress.
40. Same—Coercion—Married Women.
41. Same—Necessity.
42. Provocation.

Criminal Capacity

Since every crime consists of two elements—the act, and the mental element, commonly called "criminal intent"—no person can be guilty of crime unless he has a certain degree of mental capacity. Mental incapacity, which the criminal law recognizes, exists to a greater or less extent in four classes of persons: (1) Infants; (2) lunatics, or insane persons; (3) drunken men; and (4) corporations.

INFANCY

21. At common law a child under the age of seven years is conclusively presumed incapable of entertaining criminal intent, and cannot commit a crime. Between the ages of seven and fourteen a child is presumed to be incapable, but the presumption may be rebutted. After the age of fourteen, he is pre-

sumed to have sufficient capacity, and must affirmatively show the contrary.[1]

22. In a very few of the states the age of incapacity has been raised by statute, and in some the age at which presumption of capacity begins has been lowered.

The ground of an infant's exemption from criminal responsibility for his acts is the want of sufficient mental capacity to entertain the criminal intent which is an essential element of every crime. If a child, when he commits a wrongful act, is under the age of seven years, not even the clearest evidence, not even his own confession, indeed, will be received on the part of the state, to show that he was of a mischievous discretion. Under that age, he is absolutely irresponsible.[2] If, however, he has reached the age of seven, the state is permitted to prove that he was of sufficient capacity to entertain a criminal intent. In the absence of such proof, he is not responsible, and the proof, to warrant a conviction, must be clear and convincing.[3] It has been held that a conviction cannot be had on his own mere

[1] 4 Bl. Comm. 22; 1 Hale, P. C. 26, 27.

[2] People v. Townsend, 3 Hill (N. Y.) 479. The statutes in some few states have raised the age of absolute incapacity to ten years. Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132.

[3] Rex v. Owen, 4 Car. & P. 236; Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; State v. Barton, 71 Mo. 288; Wusnig v. State, 33 Tex. 651; State v. Adams, 76 Mo. 355; State v. Fowler, 52 Iowa, 103, 2 N. W. 983. Assault and battery by twelve year old child, State v. Goin, 9 Humph. (Tenn.) 175. See, also, State v. Tice, 90 Mo. 112, 2 S. W. 269; State v. Pugh, 52 N. C. 61; Hill v. State, 63 Ga. 578, 36 Am. Rep. 120. Sale of liquor by child, Com. v. Mead, 10 Allen (Mass.) 398; State v. Nickleson, 45 La. Ann. 1172, 14 South. 134; McCormack v. State, 102 Ala. 156, 15 South. 438; State v. Millholland, 89 Iowa, 5, 56 N. W. 403.

naked confession,[4] but there are cases holding the contrary, where the corpus delicti is otherwise proven.[5] If his age is itself in doubt, the burden of proving that he is under fourteen is on him, "as the reputed age of every one is peculiarly within his own knowledge, and also the persons by whom it can be directly proved."[6] When a child has reached the age of fourteen, he is presumed capable of committing crime; and, to escape responsibility, he must affirmatively show want of capacity.[7] In England, a boy of ten years who, after killing a little girl, hid her body, was held criminally liable, because the circumstances showed a mischievous discretion;[8] and a boy of eight years was hanged for arson.[9] In this country, a boy of twelve has been hanged for murder.[10] There are some exceptions to these rules in case of certain crimes of omission, such as failure to repair highways, etc.; infants being held exempt from responsibility, in such case, until they reach the age of twenty-one years, on the ground that until then, not having command of their fortune, they are unable to do these acts as required by law.[11] There is also an exception in the case of

[4] State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592.

[5] State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404. And see Fost. Crown Law, 72; State v. Bostick, 4 Har. (Del.) 563.

[6] State v. Arnold, 35 N. C. 184.

[7] Irby v. State, 32 Ga. 496; Law v. Com., 75 Va. 885, 40 Am. Rep. 750. His own testimony that he did not know the act was wrong is not enough. State v. Kluseman, 53 Minn. 541, 55 N. W. 741.

[8] York's Case, Fost. 70.

[9] Emlyn on 1 Hale, P. C. 25.

[10] State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404. And see State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592; GODFREY v. STATE, 31 Ala. 323, 70 Am. Dec. 494, Mikell Illus. Cas. Criminal Law, 37; Martin v. State, 90 Ala. 602, 8 South. 858, 24 Am. St. Rep. 844.

[11] 4 Bl. Comm. 22. Minor not emancipated or possessed of property cannot be held criminally liable for failure to support his wife. People v. Todd, 61 Mich. 234, 28 N. W. 79. Nor can a minor be

rape, arising from a presumption as to the physical capacity of an infant. This, however, will be mentioned in treating of the crime of rape. In some states the age of incapacity has been changed by statute.[12]

INSANITY

23. Insanity, in its legal sense, is any defect or disease of the mind which renders a person incapable of entertaining a criminal intent. Since a criminal intent is an essential element of every crime, no person who is so insane that he cannot entertain it is criminally responsible for his acts.

24. Defect of the mind, as in case of idiocy, or disease of the mind, as in case of lunacy, may have the following effects:

(a) It may render a person incapable of determining between right and wrong, and in such case no criminal responsibility attaches.

(b) It may render a person partially insane, or subject to insane delusions as to existing facts, but not in other respects insane, in which case he will be in the same situation as to responsibility as if the facts in respect to which the insane delusion exists were real.

convicted of selling mortgaged goods, as he has a right to disaffirm the mortgage, and in effect does so by the sale. Jones v. State, 31 Tex. Cr. R. 252, 20 S. W. 578. But he may be held liable in bastardy proceedings. Chandler v. Com., 4 Metc. (Ky.) 66.

[12] In Texas, there can be no conviction under the age of nine. Pen. Code 1911, art. 34. In Illinois, under the age of ten. In Minnesota, the presumption of incapacity which may be rebutted ceases at the age of twelve. Pen. Code, § 17.

(c) It may deprive him of freedom of will, as in case of irresistible impulses, in which case some courts hold that he is not responsible, while other courts hold the contrary.

25. Moral and emotional insanity, as distinguished from mental, does not exempt one from responsibility.

26. Insanity is in no case an excuse, unless the act was the direct result of the insanity.

27. A person cannot be tried, if he is insane, though he was sane when he committed the act, as he is deemed incapable of conducting his defense; nor can an insane person be sentenced and punished, even after conviction.[13]

Tests of Insanity

Many tests to determine the mental capacity necessary to render a person responsible for his acts have been laid down from time to time. It was early said that the mental capacity ordinarily possessed by a child fourteen years old, was the test.[14] Again, it was said that a person must be totally deprived of his understanding and memory, so as not to know what he was doing, "no more than an infant, a brute or a wild beast," in order to be irresponsible.[15] But the test more generally adopted at the present time is what is known as the "right and wrong test." This test was laid down in McNaghten's Case, decided in England in 1843.[16]

[13] 4 Bl. Comm. 24; State v. Peacock, 50 N. J. Law, 34, 11 Atl. 270; State v. Pritchett, 106 N. C. 667, 11 S. E. 357. See Clark, Cr. Proc. 427.

[14] Hale, P. C.

[15] Arnold's Case, 16 How. St. Tr. 764.

[16] McNaghten's Case, 10 Clark & F. 200.

Inability to Distinguish Between Right and Wrong

After the defendant in that case had been acquitted, on the ground of insanity, the question came up on debate in the House of Lords, and the opinion of the judges was asked. The judges answered, among other things, that jurors should be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time the act was committed, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The test of responsibility as here laid down has been generally applied, both in England and in this country.[17]

No court, since this decision, has required greater evidence of insanity than there laid down to prove that the accused was insane. All courts, however, as we shall pres-

[17] Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Dunn v. People, 109 Ill. 635; Hornish v. People, 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237; Blackburn v. State, 23 Ohio St. 146; Brown v. Com., 78 Pa. 122; Spann v. State, 47 Ga. 553; U. S. v. McGlue, 1 Curt. 8, Fed. Cas. No. 15,679; U. S. v. Faulkner (D. C.) 35 Fed. 730; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; State v. Gut, 13 Minn. 341 (Gil. 315). Idiocy: Com. v. Heath, 11 Gray (Mass.) 303; Ortwein v. Com., 76 Pa. 414, 18 Am. Rep. 420. Imbecility or dementia, not amounting to idiocy or lunacy, may exempt where the intellect was weaker than that of a child. State v. Richards, 39 Conn. 591. But see Wartena v. State, 105 Ind. 445, 5 N. E. 20. Ability to "carefully weigh reasons" not necessary to render one liable. State v. Swift, 57 Conn. 496, 18 Atl. 664. And see cases in other states, cited in subsequent notes.

ently see, do not require so great proof of insanity to make out this defense.

Partial Insanity—Insane Delusions

Another answer of the judges to the House of Lords, after the McNaghten Case, was in reply to the question whether a person would be excused if he should commit an offense under and in consequence of an insane delusion as to existing facts. The answer was, in substance, that if a person is laboring under a partial delusion, not being in other respects insane, he must be considered in the same situation as to responsibility as if the facts in respect to which the delusion exists were real; that if, for example, a person, under the influence of his delusion, supposes another man to be in the act of attempting to take his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment, but if his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment. This rule has been generally followed, both in England and in this country,[18] but has been severely criticised.[19] It is necessary, however, to under-

[18] Hadfield's Case, 27 How. St. Tr. 1282; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; People v. Pine, 2 Barb. (N. Y.) 571; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; STATE v. JONES, 50 N. H. 369, 9 Am. Rep. 242, Mikell Illus. Cas. Criminal Law, 43; State v. Lewis, 20 Nev. 333, 22 Pac. 241; Thurman v. State, 32 Neb. 224, 49 N. W. 338. Homicide, delusion that deceased was trying to marry defendant's mother no excuse. Bolling v. State, 54 Ark. 588, 16 S. W. 658. Killing fellow convict, delusion that deceased had divulged plan of escape no excuse. People v. Taylor, 138 N. Y. 398, 34 N. E. 275.

[19] "The doctrine thus promulgated as law has found its way into the text-books, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenious student of the law ever read it for the first time

stand what the law means by an insane delusion. The delusion must be mental, and not moral; that is, it must not arise from moral degradation or passion, as this is mere moral insanity. There must be an actual delusion, and it is also necessary that the act shall be immediately connected with the delusion. If a person knows all the facts as to which he acts, he is not exempt, and it is immaterial that he has an insane delusion as to other facts.[20] Another essential is that the delusion must not be the result of negligence. If a person has the opportunity, and has sufficient reason, to correct a delusion, and, instead of doing so, continues to nourish it, he is responsible. Mere false judgment does not amount to an insane delusion, nor do erroneous opinions on questions of religion or politics.[21]

Irresistible Impulse [22]

Some confusion exists in the use of the term "irresistible impulse." This confusion has sometimes led to the citing of the same case as authority both for and against the proposi-

without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane accountable for the exercise of the same reason, judgment, and controlling mental power that is required of a man in perfect mental health. It is, in effect, saying to the jury that the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness." Ladd, J., in STATE v. JONES, 50 N. H. 369, 9 Am. Rep. 242, Mikell Illus. Cas. Criminal Law, 43.

[20] Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; State v. Gut, 13 Minn. 341 (Gil. 315); State v. Huting, 21 Mo. 464; State v. Windsor, 5 Har. (Del.) 512; U. S. v. Ridgeway (C. C.) 31 Fed. 144; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Maier, 36 W. Va. 757, 15 S. E. 991.

[21] Guiteau's Case (D. C.) 10 Fed. 171.

[22] There is great danger of being misled by the cases on moral insanity and irresistible impulse from disease of the mind, as the judges sometimes use the former term when they mean the latter. The student, therefore, and the lawyer as well, must examine the

tion that irresistible impulse is a good defense. This confusion has arisen from the fact that some judges use the term in contradistinction to the "right and wrong" test, while others use it as illustrative of that test, and still others deny that such a form of insanity exists in conjunction with the ability to distinguish between right and wrong.[23]

cases, and see whether the irresistible impulse spoken of arose from mental disease, or from mere moral depravity.

[23] The term is used in the first sense in Com. v. Mosler, 4 Pa. 264, where it is said: "There is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived is incapable of resistance." It is used in the second sense in Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, where the court, speaking of delusions, says: "This state of delusion indicates * * * that the mind is in a diseased state; that the known tendency of that diseased state of mind is to break out into sudden paroxysms of violence venting itself in homicide or other violent acts towards friend or foe indiscriminately, so that * * * the outbreak was of such a character that for the time being it must have overborne memory and reason, so that the act was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will." This case is cited as authority both for and against the doctrine that irresistible impulse co-existing with a knowledge of right and wrong, is a defense. See and compare Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634, and State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224. In State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224, the court says: "I cannot see how a person who rationally comprehends the nature and quality of an act and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse, and not criminal design and guilt. And if we are sure he was possessed and driven forward to the act wholly and absolutely by irresistible impulse, his mind being diseased, how can we say he rationally realized the nature of the act—realized it to an extent to enable us to hold

Properly speaking, a person acts under an insane irresistible impulse when, from disease of the mind, he is incapable of restraining himself, though he may know that he is doing wrong. In other words, a person may know that he is doing wrong when he does an act, but, by reason of the duress of a mental disease, he may have lost the power to choose between the right and wrong, and to avoid doing the act, his free agency being at the time destroyed.[24] In some states, and in England, the courts have refused to recognize this as a ground of exemption from responsibility, and limit the test to the ability to distinguish between right and wrong,[25] but in other states it is recognized.[26]

him criminal in the act? How can the knowledge of the nature and wrongfulness of the act exist along with such impulse as shall exonerate him?"

[24] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193 (explaining irresistible impulse).

[25] Reg. v. Stokes, 3 Car. & K. 185; Reg. v. Haynes, 1 Fost. & F. 666; State v. Lawrence, 57 Me. 574; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731 (but contra in case of epilepsy, People v. Barber, 115 N. Y. 475, 22 N. E. 182; and for kleptomania case, see People v. Sprague, 2 Parker, Cr. R. [N. Y.] 43); Brinkley v. State, 58 Ga. 296; Fogarty v. State, 80 Ga. 450, 5 S. E. 782; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; State v. Pagels, 92 Mo. 300, 4 S. W. 931; State v. Miller, 111 Mo. 542, 20 S. W. 243; State v. Mowry, 37 Kan. 369, 15 Pac. 282; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; STATE v. KNIGHT, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373, Mikell Illus. Cas. Criminal Law, 39. In some states the defense of irresistible impulse is excluded by statute. People v. Taylor, 138 N. Y. 398, 34 N. E. 275; State v. Scott, 41 Minn. 365, 43 N. W. 62. It is said in Davis v. State, 44 Fla. 32, 32 South. 822, that the tendency of some modern courts to recognize that phase of insanity known as "irresistible impulse" as a defense should not be favored and will not be supported in that court. And in Com. v. Renzo, 216 Pa. 147, 65 Atl. 30, it is said that the law of

[26] See footnote 26 on following page.

The argument against recognizing irresistible impulse as a ground of exemption is practical, rather than logical. "If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence —the restraint of religion, the restraint of conscience, and the restraint of law. But, if the influence itself be held a

Pennsylvania does not tolerate the doctrine of "transitory frenzy" as a defense to murder; that in the eye of the law it is nothing but vindictive and reckless temper. A mental disorder called "constitutional inferiority" does not excuse a homicide, and the defendant may be found guilty of murder in the first degree. Com. v. Cooper, 219 Mass. 1, 106 N. E. 545.

[20] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193; People v. Finley, 38 Mich. 482; STATE v. JONES, 50 N. H. 369, 9 Am. Rep. 242, Mikell Illus. Cas. Criminal Law, 43; State v. Felter, 25 Iowa, 67; State v. Mewherter, 46 Iowa, 88; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Dacey v. People, 116 Ill. 555, 6 N. E. 165; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Bradley v. State, 31 Ind. 492, at page 509; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Com. v. Mosler, 4 Pa. 266; Sayres v. Com., 88 Pa. 300; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Smith v. Com., 1 Duv. (Ky.) 224; State v. Windsor, 5 Har. (Del.) 512; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; State v. Johnson, 40 Conn. 136; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638. Kleptomania cases: Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646; People v. Sprague, 2 Parker, Cr. R. (N. Y.) 43. And see Com. v. Fritch, 9 Pa. Co. Ct. R. 164. Kleptomania is an "irresistible impulse" to steal; hence those courts that refuse to recognize the defense of irresistible impulse in cases of homicide should logically refuse to allow kleptomania as a defense in indictments for larceny, and vice versa. Some have so held. State v. Riddle, 245 Mo. 451, 150 S. W. 1044, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884; State v. McCullough, 114 Iowa, 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382.

legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—the forbidding and punishing its perpetration." [27] The fallacy of the argument is the assumption that it is possible by law to restrain an irresistible impulse. The works on medical jurisprudence agree that such insanity exists, and, if it does, then a person so affected has control over his will no more than if a stronger man seized his hand, and made him commit an act. In the latter case, as well as in the former, he knows that the act is wrong. We have already seen that the law does not punish involuntary acts. The difficulty is in proving an insane irresistible impulse, and distinguishing it from moral insanity, which is defined in the following paragraph.

Some of the courts which refuse to recognize irresistible impulse from disease of the mind say that there is no such thing, and that it is nothing but moral depravity. If, however, as men of science declare, there is such a disease, it would seem that its existence should be a question of fact for the jury, and not for the judge. In any event, where the defense is recognized, the impulse must be irresistible, and must be caused by disease of the mind. Mere passion in a sane person does not exempt, as it is nothing more than moral insanity. It also seems that the act must be so connected with the mental disease, in the relation of cause and effect, as to be the product of it solely.[28]

Moral and Emotional Insanity

"Moral insanity" is a term applied to a perverted condition of the moral nature, which impels a man naturally towards crime. Thus, from low associations and surround-

[27] Per Bramwell, B., in Reg. v. Haynes, 1 Fost. & F. 666.
[28] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193.

ings, and from constant and unrestrained indulgence in vice, a man's disposition or character may become so morbid and diseased that his conscience will not restrain him. Although his mind may be sound, and he may know right from wrong, his passions may have become so strong that he has virtually lost control of them. This condition is distinguished from the irresistible impulse, already explained, by the fact that the mind is not diseased, as in the latter case. Moral insanity does not exempt a person from criminal responsibility.[19] Mere emotional insanity or temporary frenzy or passion arising from excitement or anger, and not from any mental disease, is never an excuse.[20]

Presumption and Burden of Proof

The rules of evidence in criminal cases give the state the burden of proving every element of the crime charged to exist, and require that in order to convict the jury must be

[19] Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; U. S. v. Holmes, 1 Cliff. 98, Fed. Cas. No. 15,382; State v. Lawrence, 57 Me. 574; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; State v. Potts, 100 N. C. 457, 6 S. E. 657; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; People v. Finley, 38 Mich. 482; People v. Durfee, 62 Mich. 487, 29 N. W. 109.

[20] "The medical profession, in their humane efforts to diagnose and ameliorate every form of mental as well as bodily variation from normal condition, may be justified in giving it a specific name and description ['transitory frenzy']; but in the eye of the law it is nothing but vindictive and reckless temper." Per curiam in Com. v. Renzo, 216 Pa. 147, 65 Atl. 30. See, also, People v. Mortimer, 48 Mich. 37, 11 N. W. 776; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; People v. Foy, 138 N. Y. 664, 34 N. E. 396; People v. McDonell, 47 Cal. 134; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; State v. Johnson, 40 Conn. 136; State v. Sorenson, 32 Minn, 118, 19 N. W. 738; State v. Murray, 11 Or. 413, 5 Pac. 55; State v. Stickley, 41 Iowa, 232; Williams v. State, 50 Ark. 511, 9 S. W. 5; Smith v. State, 55 Ark. 259, 18 S. W. 237.

satisfied of defendant's guilt beyond a reasonable doubt. Since intent is one of the elements the state must prove, and there can be no intent if the accused is not sane, it follows that where a defendant sets up the plea of insanity, and the jury have a reasonable doubt on the question, they should acquit him; but the courts are not agreed on this point. They are agreed, however, to this extent, namely, that all men are presumed to be sane until the contrary appears, and that a defendant who sets up the plea of insanity must introduce some evidence to rebut the presumption. When we get to this point, the courts begin to differ. It is held by some courts that the burden is on the defendant to establish his insanity beyond a reasonable doubt—that is to say, if the jury have any doubt, they must convict.[21] Other courts hold that the burden is on defendant to prove insanity, not beyond a reasonable doubt, but only by a preponderance of the evidence.[22] Many other courts, on the

[21] People v. Myers, 20 Cal. 518; State v. Spencer, 21 N. J. Law, 202; State v. De Rance, 34 La. Ann. 186, 44 Am. Rep. 426; State v. Murray, 11 Or. 413, 5 Pac. 55.

[22] Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; (but see Com. v. Harrison, 11 Gray [Mass.] 308); Loeffner v. State, 10 Ohio St. 598; Fisher v. People, 23 Ill. 283 (but see, contra, Langdon v. People, 133 Ill. 382, 24 N. E. 874); State v. Lawrence, 57 Me. 574; State v. Starling, 51 N. C. 366; State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. McCoy, 34 Mo. 531, 86 Am. Dec. 121; State v. Schaefer, 116 Mo. 96, 22 S. W. 447; Bonfanti v. State, 2 Minn. 123 (Gil. 99); State v. Grear, 29 Minn. 221, 13 N. W. 140; State v. Trout, 74 Iowa, 545, 38 N. W. 405, 7 Am. St. Rep. 499; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Rather v. State, 25 Tex. App. 623, 9 S. W. 69; Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193; Gunter v. State, 83 Ala. 96, 3 South. 600; Maxwell v. State, 89 Ala. 150, 7 South. 824; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Bawden, 90 Cal. 195, 27 Pac. 204; Fogarty v. State, 80 Ga. 450, 5 S. E. 782; Coates v. State, 50 Ark. 330, 7 S. W. 304; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Moore v. Com., 92 Ky. 630, 18 S. W. 833; State v. Alexander,

contrary, hold that, though the burden is on the defendant to introduce some evidence to rebut the presumption of sanity, yet, if the evidence raises a reasonable doubt as to whether he was sane, he is entitled to an acquittal.[88] The cases cited will show how the courts of the different states stand on this question.

30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Lewis, 20 Nev. 333, 22 Pac. 241; People v. Dillon, 8 Utah, 92, 30 Pac. 150; Com. v. Wheeler, 246 Pa. 528, 92 Atl. 718; State v. Quigley, 26 R. I. 263, 58 Atl. 905, 67 L. R. A. 322, 3 Ann. Cas. 920; State v. Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006. In a recent case in Delaware the jury were instructed that, insanity being matter of defense, the burden of showing it is upon the defendant, and it must be proved as a fact to the satisfaction of the jury. State v. Jack, 4 Pennewill, 470, 58 Atl. 833.

[88] Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; U. S. v. Faulkner (D. C.) 35 Fed. 730; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Reidell, 9 Houst. (Del.) 470, '14 Atl. 550; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; Brotherton v. People, 75 N. Y. 159; Walker v. People, 88 N. Y. 81; State v. Nixon, 32 Kan. 205, 4 Pac. 159; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Revoir v. State, 82 Wis. 295, 52 N. W. 84; Com. v. Gerade, 145 Pa. 289, 22 Atl. 464, 27 Am. St. Rep. 689; King v. State, 91 Tenn. 617, 20 S. W. 169; Hodge v. State, 26 Fla. 11, 7 South. 593; Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905; Adair v. State, 6 Okl. Cr. 284, 118 Pac. 416, 44 L. R. A. (N. S.) 119. In the absence of any evidence to raise a reasonable doubt, the prosecution is not obliged to prove sanity. Montag v. People, 141 Ill. 75, 30 N. E. 337; Armstrong v. State, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484; People v. Spencer, 179 N. Y. 408, 72 N. E. 461.

DRUNKENNESS

28. Voluntary drunkenness furnishes no ground of exemption from criminal responsibility, except—

EXCEPTIONS—(a) Where the act is committed while laboring under settled insanity, or delirium tremens, resulting from intoxication.

(b) Where a specific intent is essential to constitute the crime, the fact of intoxication may negative its existence.

(c) The fact of intoxication may be material, where provocation for the act is shown.

29. No criminal responsibility attaches for acts committed while in a state of involuntary drunkenness, destroying the reason and will.

Voluntary Drunkenness No Excuse

When a person drinks voluntarily, and becomes intoxicated, and while in such condition does an act which would be a crime if he were sober, he is nevertheless responsible; the settled rule being that voluntary drunkenness is no excuse.[84]

[84] Pearson's Case, 2 Lewin, Cr. Cas. 144; U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993; Com. v. Hawkins, 3 Gray (Mass.) 463; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; State v. John, 30 N. C. 330, 49 Am. Dec. 396; Pirtle v. State, 9 Humph. (Tenn.) 663; McIntyre v. People, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; Upstone v. People, 109 Ill. 169; People v. Lewis, 36 Cal. 531; People v. Travers, 88 Cal. 233, 26 Pac. 88; Willis v. Com., 32 Grat. (Va.) 929; Fonville v. State, 91 Ala. 39, 8 South. 688; Engelhardt v. State, 88 Ala. 100, 7 South. 154; Beck v. State, 76 Ga. 452; State v. Lowe, 93 Mo. 547, 5 S. W. 889; State v. Mowry, 37 Kan. 369, 15 Pac. 282. No defense on voting twice at election. State v. Welch, 21 Minn. 22. Contra, People v. Harris, 29 Cal. 679. The fact that liquor was furnished by person killed no defense. State v. Sopher, 70 Iowa, 494, 30 N. W. 917.

According to the old law, voluntary drunkenness was regarded as an aggravation of the offense,[85] but this is no longer the law. Drunkenness may be punishable as a substantive crime, even at common law, if it is so open and notorious as to offend the sense of public decency and constitute a public nuisance; but a specific crime is never aggravated by the fact that the accused was drunk when he committed it.[86]

A person may be so drunk when he commits an act that he is incapable, at the time, of knowing what he is doing, yet if the intoxication be voluntary he is not the less responsible. A drunken man, equally with a sober man, is presumed to intend his acts, and the natural and ordinary consequences thereof, and is responsible for the reasonable exercise of his understanding, memory, and will.

Insanity—Delirium Tremens

We have seen that an insane man is not responsible for acts to which his insanity drives him. This is true when the insanity was caused by voluntary drinking, for the law does not go back of the fact of insanity to ascertain the cause. Hence one is not responsible for acts done by him while he is suffering from delirium tremens.[87] This does not mean that if a man drinks to excess, and thereby tem-

[85] 4 Bl. Comm. 25, 26; 1 Inst. 247.

[86] McIntyre v. People, 38 Ill. 514.

[87] Regina v. Davis, 14 Cox Cr. Cas. 563; U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993; U. S. v. McGlue, 1 Curt. 1, 13, Fed. Cas. No. 15,679; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Maconnehey v. State, 5 Ohio St. 77; State v. Potts, 100 N. C. 457, 6 S. E. 657; Fisher v. State, 64 Ind. 435; Wagner v. State, 116 Ind. 181, 18 N. E. 833; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Kelley v. State, 31 Tex. Cr. R. 216, 20 S. W. 357; Terrill v. State, 74 Wis. 278, 42 N. W. 243; French v. State, 93 Wis. 325, 67 N. W. 706.

porarily destroys his mental soundness to such an extent that he does not know right from wrong, he is excused for an act done while in this condition, for in this case the unsoundness of mind is the immediate product of drinking.[28]

The insanity or delirium, to serve as an excuse, must be a fixed condition of insanity, caused, not by the effects of a single debauch, but by a habit of drinking.[29]

Same—Where Specific Intent Required

An important exception to the rule that voluntary drunkenness furnishes no exemption from criminal responsibility is found in cases where the law requires a specific intent to render an act a particular crime or degree of crime. The mere intent to become intoxicated, actual, or implied from the fact of drinking, can only supply a general wrongful intent. Where a person is too drunk when he commits an act to entertain the specific intent, essential in order that the act may constitute a particular crime, and did not first form such intent, and then become intoxicated, he is not responsible for that particular crime. If, however, one makes up his mind to do an act, entertaining the necessary specific intent, and then becomes intoxicated, and commits it, he is responsible. At common law one may commit murder although the homicide is not premeditated, and even without actual intention to kill; and upon an indictment for murder voluntary drunkeness is no excuse. But where, by statute, murder is divided into two degrees, and, to constitute murder in the first degree, a premeditated design or deliberate premeditation to kill is required, a person who, when he kills another, is too drunk to be capable of such design or

[28] STATE v. HAAB, 105 La. 230, 29 South. 725, Mikell Illus. Cas. Criminal Law, 46.

[29] STATE v. HAAB, 105 La. 230, 29 South. 725, Mikell Illus. Cas. Criminal Law, 46; Bishop, New Cr. L. (8th Ed.) § 406.

premeditation, and who had not such design when he drank, cannot be held responsible for murder in the first degree.[40] But if one makes up his mind to kill another, and then becomes drunk, and kills him, he is guilty of that degree of murder.[41] This is so also in case of larceny or robbery, in which the specific intent to steal the goods taken is necessary;[42] and in many other crimes, such as perjury,[43] assaults with intent to murder or to do great bodily harm,[44]

[40] Tucker v. U. S., 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112; Hopt v. Utah, 104 U. S. 631, 26 L. Ed. 873; State v. Johnson, 40 Conn. 136; Id., 41 Conn. 584; Keenan v. Com., 44 Pa. 55, 84 Am. Dec. 414; Jones v. Com., 75 Pa. 403; Willis v. Com., 32 Grat. (Va.) 929; Haile v. State, 11 Humph. (Tenn.) 154; Pirtle v. State, 9 Humph. (Tenn.) 663; Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Bernhardt v. State, 82 Wis. 23, 51 N. W. 1009; King v. State, 90 Ala. 612, 8 South. 856; People v. Belencia, 21 Cal. 544; People v. Vincent, 95 Cal. 425, 30 Pac. 581; People v. Leonardi, 143 N. Y. 360, 38 N. E. 372; People v. Corey, 148 N. Y. 476, 42 N. E. 1066; HILL v. STATE, 42 Neb. 503, 60 N. W. 916, Mikell Illus. Cas. Criminal Law, 195.

[41] State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799. And see State v. Gut, 13 Minn. 341 (Gil. 315); State v. Douglass (Kan.) 24 Pac. 1118; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85.

[42] Loza v. State, 1 Tex. App. 488, 28 Am. Rep. 416; People v. Cummins, 47 Mich. 334, 11 N. W. 184, 186; People v. Walker, 38 Mich. 156; Wood v. State, 34 Ark. 341, 36 Am. Rep. 13; State v. Schingen, 20 Wis. 74; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Keeton v. Com., 92 Ky. 522, 18 S. W. 359; Bailey v. State, 26 Ind. 422; Rogers v. State, 33 Ind. 543. But see, contra, Dawson v. State, 16 Ind. 428, 79 Am. Dec. 439. See dictum in Bartholomew v. People, 104 Ill. 605, 44 Am. Rep. 97. Taking property for fun while intoxicated, People v. Wilson, 55 Mich. 507, 21 N. W. 905. Voting twice at election, People v. Harris, 29 Cal. 679. Contra, State v. Welch, 21 Minn. 22. Intent to do bodily harm, State v. Garvey, 11 Minn. 154 (Gil. 95).

[43] Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 903.

[44] Lancaster v. State, 2 Lea (Tenn.) 575; Roberts v. People, 19 Mich. 401; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St.

or to rape,[45] or breaking into a house with intent to steal or commit some other felony therein, as in case of burglary,[46] or passing a forged check or counterfeit money.[47] In some states the statutes do not allow drunkenness to be shown to negative intent.[48]

When we come to treat of homicide, we shall see that murder, at common law, is the killing of a person with malice aforethought. We shall also see that, if the killing is done under what the law recognizes as sufficient provocation to exclude malice, the homicide is manslaughter only. To constitute the malice essential to murder at common law (or murder in the second degree under the statutes), no specific intent to kill is necessary, but general malice will suffice. Now, we have seen that in case of voluntary drinking, a drunken man, equally with a sober man, is presumed to intend his acts and their natural results, and that it is no excuse for him to say that he was drunk. Drunkenness, therefore, is no defense on a prosecution for murder, where the killing was done without provocation. Where, however, there is evidence of adequate provocation, drunkenness may be shown to prove that the act was committed under the influence of sudden passion, caused by the provocation, and not from some precedent malice, and thus to reduce the crime to manslaughter.[49]

Rep. 44; State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296. And see State v. Garvey, 11 Minn. 154 (Gil. 95). So of attempt to commit suicide. Reg. v. Doody, 6 Cox, Cr. Cas. 463.

[45] State v. Donovan, 61 Iowa, 369, 16 N. W. 206; Head v. State, 43 Neb. 30, 61 N. W. 494.

[46] State v. Bell, 29 Iowa, 316; People v. Phelan, 93 Cal. 111, 28 Pac. 855.

[47] O'Grady v. State, 36 Neb. 320, 54 N. W. 556; Pigman v. State, 14 Ohio, 555, 45 Am. Dec. 558.

[48] Bartholomew v. People, 104 Ill. 605, 44 Am. Rep. 97. And see State v. Cross, 27 Mo. 332; State v. Tatro, 50 Vt. 483.

[49] Rex v. Thomas, 7 Car. & P. 817; In re Pearson, 2 Lewin, Cr.

In some cases it is said also that the fact that the accused was drunk may be considered in order to determine whether he acted upon a bona fide apprehension that his person or property was about to be attacked.[50] This, however, would seem to be wrong. The defense involved is mistake of fact, and to make good this defense it must be shown, not only that the mistake was bona fide, but also that it was such a mistake as would have been made by a reasonable man; and a drunken man is not a reasonable one.[51]

Involuntary Intoxication

If a person involuntarily, through the stratagem or fraud of another, or the negligence of his physician, becomes so drunk that he does not know what he is doing, he is not criminally responsible for his acts.[52] The drinking itself must be involuntary, for one cannot drink intoxicating liquors to excess, or voluntarily take liquor in a social way, and, after committing a crime, say he did not intend to become drunk.[53]

Dipsomania is a disease, creating an irresistible impulse to drink. As it is a disease, and the intoxication caused by it is involuntary, an act done by one suffering from it should be excused as in other cases of involuntary drunkenness.

Cas. 144; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Buckhannon v. Com., 86 Ky. 110, 5 S. W. 358; Jones v. State, 29 Ga. 594; McIntyre v. People, 38 Ill. 514; Ferrell v. State, 43 Tex. 503; Wenz v. State, 1 Tex. App. 36; People v. Williams, 43 Cal. 344; Williams v. State, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133. Contra, Com. v. Hawkins, 3 Gray (Mass.) 463.

[50] Marshall's Case, 1 Lew. 76.

[51] Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85; State v. Mullen, 14 La. Ann. 570.

[52] 1 Hale, P. C. 32; In re Pearson, 2 Lewin, Cr. Cas. 144.

[53] McCook v. State, 91 Ga. 740, 17 S. E. 1019.

This view has been taken by some courts;[54] others, however, have refused to recognize drunkenness so caused as a defense.[55]

It seems that if a person, through a susceptibility to stimulants, resulting from some cause of which he is not aware, is made drunk by a small quantity of liquor, which he has been accustomed to drink without such effect, he will not be held liable as in case of voluntary drunkenness. His intoxication, in such case, is more properly regarded as involuntary.[56]

CORPORATIONS

30. A corporation may be criminally liable for omission to perform a duty imposed upon it by law.

31. A corporation may be criminally liable for certain acts of misfeasance, such as maintaining a nuisance. It cannot be guilty of felony or perjury, or (it seems) of offenses against the person, or of those involving malice or evil intention.

32. A corporation may be punished for contempt of court.

Nonfeasance

Although it was once said that "a corporation is not indictable, but the particular members of it are," [57] it is now well settled that a corporation may be indicted for omission

[54] State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; State v. Johnson, 40 Conn. 136; STATE v. HAAB, 105 La. 230, 29 South. 725, Mikell Illus. Cas. Criminal Law, 46.

[55] Choice v. State, 31 Ga. 424; State v. Potts, 100 N. C. 457, 6 S. E. 657; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052.

[56] 1 Whart. Cr. Law, § 55. And see Roberts v. People, 19 Mich. 401.

[57] Anon., 12 Mod. 559.

to perform a public duty imposed upon it by law.[58] While it cannot be imprisoned, it may, if such punishment is provided for, be fined, and deprived of its charter and franchises. Thus a railway company may be indicted for neglect to keep in repair a bridge across a cut made by it, when its road crosses a public highway, so that travel is obstructed.[59]

Misfeasance

Some cases have held that a corporation cannot be indicted for misfeasance; that it cannot commit a crime by positive or affirmative act—as by maintaining a nuisance by obstructing a navigable river.[60] This view, however, has not prevailed, and it is well settled to-day that an indictment will lie against a corporation for many acts of misfeasance. Thus an indictment lies for maintaining a nuisance by obstructing a navigable river or a public highway.[61] And

[58] Reg. v. Birmingham & G. Ry. Co., 3 Q. B. 223; New York & G. L. R. Co. v. State, 50 N. J. Law, 303, 13 Atl. 1, affirmed in 53 N. J. Law, 244, 23 Atl. 168. Contra, in New York, People v. Equitable Gas-Light Co. (Gen. Sess.) 5 N. Y. Supp. 19.

[59] New York & G. L. R. Co. v. State, supra.

[60] State v. Manufacturing Co., 20 Me. 41, 37 Am. Dec. 38 (overruled by State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586); Com. v. President, etc., of Swift Run Gap Turnpike Co., 2 Va. Cas. 362. And see State v. President, etc., of Ohio & M. R. Co., 23 Ind. 362. Corporations are now liable by statute in Indiana, State v. Baltimore & O. C. R. Co., 120 Ind. 298, 22 N. E. 307.

[61] Reg. v. Great North of England Ry. Co., 2 Cox, Cr. Cas. 70; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; Louisville & N. R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State v. Railroad Co., 91 Tenn. 445, 19 S. W. 229; St. Louis, A. & T. Ry. Co. v. State, 52 Ark. 51, 11 S. W. 1035; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280, 87 Am. Dec. 391; State v. Chicago, M. & St. P. R. Co., 77 Iowa, 442, 42 N. W. 365, 4 L. R. A. 298; State v. Roanoke Railroad & Lumber Co., 109 N. C. 860, 13 S. E. 719; State v. White Oak River Corp., 111 N. C. 661, 16 S. E. 331; State v. Railroad Co., 91 Tenn. 445, 19 S. W. 229; State v. Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519; Chicago & E. I. R. Co. v. People,

corporations have been held criminally liable for the unlawful sale of intoxicating liquor,[62] for violating the Sunday laws,[63] and for libel.[64] On prosecution of a corporation for a nuisance by obstructing a navigable stream, the corporation contended that, while it might be held liable for nonfeasance or omission to perform a legal duty or obligation, it could not be held criminally liable for misfeasance. The indictment, however, was sustained. "Corporations," said the court, "cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, or of perjury or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them." [65] So it has been held that a corporation may be indicted under a statute making it an offense for any person to permit gaming on his premises.[66]

44 Ill. App. 632; State v. Dubuque & S. C. R. Co., 88 Iowa, 508, 55 N. W. 727; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570. And see Northern Cent. Ry. Co. v. Com., 90 Pa. 305; Pittsburgh & Allegheny Bridge Co. v. Com. (Pa.) 8 Atl. 217; Palatka & I. R. R. Co. v. State, 23 Fla. 546, 3 South. 158, 11 Am. St. Rep. 395; Savannah, F. & W. Ry. Co. v. State, 23 Fla. 579, 3 South. 204; State v. Warren R. Co., 29 N. J. Law, 353; State v. Central R. Co. of New Jersey, 32 N. J. Law, 220. A municipal corporation may be indicted for maintaining a nuisance, or neglecting to remove a nuisance which it has the power to remove. People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

[62] Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 32 N. W. 275, 60 Am. Rep. 786 (action for penalty).

[63] State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[64] State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

[65] Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339.

[66] Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 197, 17 S. W. 442.

It has also been held that a corporation may be indicted for violation of a statute limiting the number of working hours of employés. "In a general sense," said the court, "it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted, when in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. In such cases the intention of its directors that the prohibited act shall be done is imputed to the corporation itself."[67]

If the penalty prescribed for the crime be both fine and imprisonment, as a corporation cannot be imprisoned, the fine alone will be imposed.[68]

Crimes Involving Particluar Intent or Personal Violence

A corporation may be held liable in tort for malicious wrongs, such as libel or malicious prosecution, and for fraud, the malice or evil intent of the agent being imputed to it; and it may be held liable civilly for assault and battery; and exemplary or punitive damages may be recovered in proper cases.[69] There appears to be no sufficient reason why this doctrine should not be extended so as to render corporations criminally liable in such cases, so far as the nature of the punishment provided for by statute

[67] U. S. v. JOHN KELSO CO. (D. C.) 86 Fed. 304, Mikell Illus. Cas. Criminal Law, 49.

[68] Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 197, 17 S. W. 442.

[69] Clark, Corp. 193, 199.

permits this to be done.[70] In a case where it was held that a corporation was indictable for keeping a disorderly house, the New Jersey court, after adverting to the civil liability of corporations in such cases, said: "It is difficult, therefore, to see how a corporation may be amenable to a civil suit for libel and malicious prosecution and private nuisance, and be mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public. * * * The question whether a criminal intent may be imputed to a corporation is not necessarily involved in the discussion of the case before us. The habitual indulgence in the vicious practices on the premises of the defendant corporation stamps it as a disorderly house, without regard to the intent which prompted the disorder.[71]

The rule is generally declared, however, that a corporation is not criminally liable for malicious wrongs, or for wrongs involving evil intention or personal violence.[72]

But recently it has been held that a corporation may commit the offense of knowingly and fraudulently concealing its property,[73] and even that it may be guilty of manslaughter; and this even though the penalty prescribed be imprisonment at hard labor.[74] In this case the court said: "A corporation can be guilty of causing death by its wrongful

[70] 1 Whart. Cr. Law, § 87.

[71] State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680.

[72] See Orr v. Bank of United States, 1 Ohio, 36, 13 Am. Dec. 588; Com. v. Proprietors of New Bedford Bridge, supra. But see State v. Atchison, supra.

[73] Cohen v. U. S., 157 Fed. 651, 85 C. C. A. 113.

[74] U. S. v. Van Schaick (C. C.) 134 Fed. 592, and see 14 Col. L. R. 469. Contra People v. Rochester R. & Light Co., 59 Misc. Rep. 347, 112 N. Y. Supp. 362, affirmed in 129 App. Div. 843, 114 N. Y. Supp. 755, again in 195 N. Y. 102, 88 N. E. 22, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837; Rex v. Great Western Laundry Co., 13 Manitoba, 66. A corporation has been held indictable for criminal negligence resulting in death. Union Colliery v. Queen, 31 Can. Sup. Ct. 81.

act. It can with equal propriety be punished in a civil or criminal action. It seems a more reasonable alternative that Congress inadvertently omitted to provide a suitable punishment for the offense when committed by a corporation than that it intended to give the owner [a corporation owning a vessel which it had failed to supply with life preservers] impunity simply because it happened to be a corporation."

Contempt of Court

A corporation may be guilty of a contempt of court by reason of acts or omissions of its officers—as for violation of an injunction. In such cases the court has the same power to punish by fine as in the case of a natural person.[75]

IGNORANCE OR MISTAKE OF LAW

33. Ignorance on the part of the wrongdoer of the law which makes an act criminal is no excuse.

34. If a specific intent is essential to a crime, and ignorance of the law negatives such intent, such ignorance prevents the crime from being consummated.

Ignorance or mistake, as affecting the mental element essential to crime, may have an important bearing upon the criminal liability of the accused. The subject divides itself into ignorance and mistake of (1) law and (2) fact.

It is the settled rule that ignorance of the law furnishes

[75] Clark, Corp. 220, citing People v. Albany & V. R. Co., 12 Abb. Prac. (N. Y.) 171; Golden Gate Consol. Hydraulic Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Mayor, etc., of City of New York v. New York & S. I. Ferry Co., 64 N. Y. 624; U. S. v. Memphis & L. R. R. Co. (C. C.) 6 Fed. 237.

no exemption from criminal responsibility.[76] This rule was even applied in the extreme case of violation of a statute by a person who was at sea when it was enacted, and when he violated it, and who could not have learned of it.[77] Even foreigners coming into a country, and ignorantly violating its laws, are liable, though the act may not be a crime in their own country.[78] Nor is positive belief that an act is lawful an excuse. It is no defense that one who has violated a law believed in good faith that it was unconstitutional, and was so advised by learned counsel. It was so held in a prosecution in New York of Susan B. Anthony for illegally voting for members of Congress, in which she set up the defense that she believed, and had been advised by counsel, that she was entitled to vote.[79] An erroneous belief in the right to marry, and advice of a justice that such right exists, is no excuse on prosecution for bigamy or adultery.[80] So, if a Mormon marries more than one woman, he cannot escape liability for bigamy on the ground that he thought the law prohibiting a man from having a plurality

[76] 4 Bl. Comm. 27; Whitton v. State, 37 Miss. 379; Jellico Coal Min. Co. v. Com., 96 Ky. 373, 29 S. W. 26. Belief of convict in right to vote, Hamilton v. People, 57 Barb. (N. Y.) 625. But see Com. v. Bradford, 9 Metc. (Mass.) 268. Mistake of law as to one's right to take life no excuse for homicide, People v. Cook, 39 Mich. 236, 33 Am. Rep. 380. This rule of law is sometimes stated to be: "Every one, is presumed to know the law." But as said by Maule, J., in Martindale v. Faulkner, 2 C. B. 706, "There is no presumption in this country that every person knows the law. It would be contrary to common sense and reason if it were so."

[77] Rex v. Bailey, Russ. & R. 1.

[78] Rex v. Esop, 7 Car. & P. 456; Barronet's Case, 1 El. & Bl. 1 (a case of duelling by a Frenchman in England).

[79] U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459.

[80] State v. Goodenow, 65 Me. 30; Medrano v. State, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

of wives did not apply to a marriage by him in accordance with his religion, or that it was an invalid law.[81]

Specific Intent

On the other hand, if a specific intent is essential to a crime, and ignorance of law negatives the existence of such intent, the ignorance necessarily furnishes an exemption. Take the case of larceny for an example. Here it is essential that the property shall be taken with a specific fraudulent intent; therefore one who takes property which, because of his ignorance of the law, he in good faith believes to be his own, does not commit the crime of larceny.[82] So, where a woman was indicted for setting fire to furze growing on a common, under a statute making it a felony "unlawfully and maliciously" to set fire to furze, it was held that, if she set the fire thinking she had a right to do so, it would not be a criminal offense.[83]

So when specific knowledge is a necessary ingredient of the crime, a mistake of law which negatives such knowledge is a good defense. Thus, on an indictment under a statute making it an offense for one to vote "knowing him-

[81] Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244; Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481. See, also, as to effect of religious belief, Reg. v. Downes, 13 Cox, Cr. Cas. 111. Ante, p. 51, and cases cited. Post, p. 410. Under a statute making it unlawful to carry concealed a deadly weapon, it is no defense that one thought he had a right under a statute to carry a pistol, and would have had, had the statute been constitutional. Swincher v. Com. (Ky.) 72 S. W. 306.

[82] Rex v. Hall, 3 Car. & P. 409; Reg. v. Reed, Car. & M. 306; Com. v. Stebbins, 8 Gray (Mass.) 492; People v. Husband, 36 Mich. 306. Mere custom to take another's property, such as fruit, and belief that there is no harm, are no excuse. Com. v. Doane, 1 Cush. (Mass.) 5.

[83] Reg. v. Twose, 14 Cox, Cr. Cas. 327. See 22 Harv. L. R. 75.

self not to be a legal voter," evidence that the accused believed he had a legal right to vote is admissible in his defense.[84]

IGNORANCE OR MISTAKE OF FACT—COMMON-LAW OFFENSES

35. At common law, ignorance or mistake of fact, as a rule, exempts a person from criminal liability, if the act done would be lawful were the facts as the actor believes, provided that the ignorance or mistake is not voluntary, or due to negligence.

SAME—STATUTORY OFFENSES

36. Where an offense is defined by statute, whether or not ignorance or mistake of fact exempts a person doing a prohibited act from criminal liability, as at common law, depends upon the language and construction of the statute. Unless the intention is clearly expressed, it must be determined by a construction of the statute, in view of the nature of the offense and the evils to be remedied, and of other matters making the one construction or the other reasonable, whether it was the intention to make knowledge of the facts an essential element of the offense.

Common-Law Offenses

The ground on which ignorance or mistake as to facts is an excuse for doing an act which but for such mistake would be a crime is because of the absence of criminal in-

[84] Com. v. Bradford, 9 Metc. (Mass.) 268.

tent. The law looks at the circumstances from the standpoint of the accused, and does not punish him, if, assuming the facts to be as they seemed to him, he committed no wrong. Thus, if one shoot another in his house, supposing, on reasonable grounds, that he is a burglar, he is in the same position as if he had shot a burglar, though the person killed was a servant.[85] Another example is the case of homicide in self-defense. If one kills an assailant, reasonably believing it necessary to save his own life, he is excused, though there may not in fact have been any such necessity.[86] Mistake of fact, however, is no excuse if the facts, as believed by the accused, would furnish no excuse, nor if he voluntarily closed his eyes to the truth. Thus, if one shoots at a person, and kills him, it is no defense to say that he thought he was shooting at some other person, if he was not justified in shooting at the other person; or that he thought the gun was less heavily loaded, and intended only to wound him slightly. Here the intention is criminal.[87] So is it no defense for one who throws stones from a building into a street, where he knows people may be passing at any moment, to say that he did not know any one was passing. And if a person, negligently relying on a fact which he has no right to assume, thereby injures another, the mistake, although honest, is no excuse. Thus one who snaps a pistol at another, knowing it to be loaded, and kills him, will not be heard to say he thought the cartridge too old to explode.[88] This is voluntary or negligent ignorance.

Statutory Offenses

It is competent for the Legislature to define a crime in such a way as to make the existence of any state of mind

[85] Levet's Case, 1 Hale, P. C. 474; 4 Bl. Comm. 27; ante, p. 67.
[86] Post, p. 196.
[87] Post, p. 212.
[88] State v. Hardie, 47 Iowa, 647, 29 Am. Rep. 496.

immaterial;[88] in other words, to make an act criminal notwithstanding that it be done under ignorance or mistake of fact which would, at common law, furnish an excuse. Where the statute makes it an offense to do an act "knowingly," ignorance or mistake of fact is, of course, an excuse.[89] Frequently, however, the statutory definition does not furnish this guide, and the question for determination is whether the word "knowingly" is or is not to be implied.[91] In such cases the court must construe the statute, and by consideration of its scope, the nature of the evils to be avoided, the nature of the punishment, and such other matters as make the one construction or the other reasonable or unreasonable, decide whether it was the intention of the legislature that a person doing the prohibited act should do it at his peril, or that his ignorance or mistaken belief, in good faith and upon reasonable ground, should excuse him.[92] It is impossible to reconcile the decisions of different courts upon similar enactments, but to a certain extent there is substantial agreement.

There are many statutes in the nature of police regulations for the protection of the morals of the community, or for protection of the public against fraud, under which, either because it is impracticable in most cases to prove knowledge, or because it is regarded as reasonable under the circumstances that the doer of the act should take the risk of knowing the facts, it is generally held that the pro-

[88] See Reg. v. Tolson, 23 Q. B. Div. 168, per Stephen, J.

[89] Com. v. Flannelly, 15 Gray (Mass.) 195; Smith v. State, 55 Ala. 1; Williams v. State, 23 Tex. App. 70, 3 S. W. 661; Teague v. State, 25 Tex. App. 577, 8 S. W. 667.

[91] See Steph. Hist. Cr. Law, 117.

[92] Reg. v. Tolson, supra, per Wills, J.; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496. And see, generally, cases cited under this section.

hibited act is criminal, notwithstanding his ignorance or mistake.[83] Such are acts forbidding the sale of adulterated food or intoxicating liquors,[84] or forbidding their sale to habitual drunkards or to minors,[85] under which, in most ju-

[83] "I agree that, as a rule, there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this [requiring saloons to be closed on Sunday] is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, per Cooley, C. J. Halsted v. State, 41 N. J. Law, 552, 32 Am. Rep. 247. Sale of naphtha, Com. v. Wentworth, 118 Mass. 441. Sale of calf under statutory age, Com. v. Raymond, 97 Mass. 567. Carrying illegal number of passengers on steamboat, State v. Baltimore & S. Steam Co., 13 Md. 181. Taking lunatic into unlicensed house, Reg. v. Bishop, 14 Cox, Cr. Cas. 404.

[84] Com. v. Boynton, 2 Allen (Mass.) 160 (intoxicating liquors); Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. v. Goodman, 97 Mass. 117; Com. v. Smith, 103 Mass. 444; People v. Zeiger, 6 Parker, Cr. R. (N. Y.) 355; State v. Smith, 10 R. I. 258 (adulterated milk); People v. Kibler, 106 N. Y. 321, 12 N. E. 795; King v. State, 66 Miss. 502, 6 South. 188; People v. Eddy, 59 Hun, 615, 12 N. Y. Supp. 628; Com. v. O'Kean, 152 Mass. 584, 26 N. E. 97. Contra, State v. Snyder, 44 Mo. App. 429; Waterbury v. Newton, 50 N. J. Law, 534, 14 Atl. 604; Com. v. Weiss, 139 Pa. 247, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182 (oleomargarine); State v. Kelly, 54 Ohio St. 166, 43 N. E. 163 (adulterated food). "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully, if he violates the law he incurs the penalty." Com. v. Boynton, supra, per Hoar, J.

[85] People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; State v. Hartfiel, 24 Wis. 60; State v. Heck, 23 Minn. 549 (cf. State v. Mueller, 38 Minn. 497, 38 N. W. 691); Farmer v. People, 77 Ill. 322; McCutcheon v. People, 69 Ill. 601; State v. Hause, 71 N. C. 518; Ulrich v. Com., 6 Bush (Ky.) 400; State v. Cain, 9 W. Va. 572; State v. Baer, 37 W. Va. 1, 16 S. E. 368; Barnes v. State, 19 Conn. 398;

risdictions, knowledge that the food is adulterated or the liquors are intoxicating, or that the person to whom the sale is made is a habitual drunkard or a minor, is not essential.

Where a statute prohibits, under certain circumstances or conditions, an act in itself immoral, it is generally held that the doer is guilty if the circumstances or conditions exist, notwithstanding that he committed the act in ignorance thereof, or in the belief that they did not exist.[96] Thus, where the accused was indicted under a statute which made it a crime to entice away an unmarried female under the age of 15 years for the purpose of prostitution, it was held no excuse that he honestly believed the girl was over that age, since there existed a criminal or wrongful intent notwith-

State v. Thompson, 74 Iowa, 119, 37 N. W. 104; Carlson's License, 127 Pa. 330, 18 Atl. 8; Com. v. Zelt, 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602; State v. Bruder, 35 Mo. App. 475; State v. Farr, 34 W. Va. 84, 11 S. E. 737; COM. v. STEVENS, 155 Mass. 291, 29 N. E. 508, Mikell Illus. Cas. Criminal Law, 81. Allowing minor to remain in billiard room or saloon. Com. v. Emmons, 98 Mass. 6; State v. Probasco, 62 Iowa, 400, 17 N. W. 607; State v. Kinkead, 57 Conn. 173, 17 Atl. 855. Contra, Stern v. State, 53 Ga. 229, 21 Am. Rep. 266; Crabtree v. State, 30 Ohio St. 382; Brown v. State, 24 Ind. 113; Farbach v. State, 24 Ind. 77; Goetz v. State, 41 Ind. 162; Williams v. State, 48 Ind. 306; Mulreed v. State, 107 Ind. 62, 7 N. E. 884; People v. Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385; Faulks v. People, 39 Mich. 200, 33 Am. Rep. 374; Marshall v. State, 49 Ala. 21. Even in these cases a person is not excused if he merely relied on the purchaser's representations. Behler v. State, 112 Ind. 140, 13 N. E. 272.

[96] State v. Ruhl, 8 Iowa, 447; State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496; State v. Presnell, 34 N. C. 103 (selling spirituous liquor to slave, because apparently illegal); State v. Dorman, 9 S. D. 528, 70 N. W. 848 (removing timber from school land; knowledge of character of land immaterial). See Reg. v. Prince, 13 Cox, Cr. Cas. 138. The rule as applied to sale of intoxicating liquor to a minor has been sustained on this ground. State v. Sasse, 6 S. D. 212, 60 N. W. 853, 55 Am. St. Rep. 834.

standing such belief.[97] So, under a statute enacting that one who has carnal knowledge of a girl under 16 years is guilty of rape, it is not necessary to show that the accused knew, or had reason to know, that the girl was under that age.[98]

There remains a large class of enactments which are more than mere police regulations, and which forbid acts not in their nature immoral. The tendency of the courts is, on the whole, to construe such statutes as requiring the act to be done knowingly, and to admit ignorance or mistake of fact as an excuse.[99] Great conflict exists, however, in the construction placed by different courts upon similar enactments; for example, in the application of the rule to crimes like bigamy and adultery. Thus, in a leading English case [1] the prisoner was convicted of bigamy under a statute enacting that "whoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony," but with a proviso that nothing in the

[97] State v. Ruhl, supra; State v. Houx, supra; People v. Dolan, 96 Cal. 315, 31 Pac. 107; State v. Johnson, 115 Mo. 480, 22 S. W. 463; Riley v. State (Miss.) 18 South. 117. Contra, under Texas statute, Mason v. State, 20 Tex. App. 24, 14 S. W. 71.

[98] Com. v. Murphy, supra. If the woman is under the legal age of consent, neither her representations, nor information received from others as to her age, nor her appearance with respect to age, is a defense. People v. Marks, 146 App. Div. 11, 130 N. Y. Supp. 524; Heath v. State, 173 Ind. 296, 90 N. E. 310, 21 Ann. Cas. 1056.

[99] Anon., Fost. 439; Myers v. State, 1 Conn. 502 (prosecution for allowing persons to travel in hackney coach on Sunday in violation of statute excepting cases of necessity and charity); Birney v. State, 8 Ohio, 230 (under statute against harboring any black person "the property of another"; knowledge that person harbored was slave essential); Duncan v. State, 7 Humph. (Tenn.) 148; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575 (illegal voting, in belief that accused was of age and qualified).

[1] Reg. v. Tolson, 23 Q. B. Div. 168. See, also, Squire v. State, 46 Ind. 459.

act should "extend to any person marrying a second time whose husband or wife shall have been continually absent * * * for * * * seven years last past, and shall not have been known by such person to be living within that time." It appeared that the prisoner had remarried within seven years of the time when she last knew her husband was alive, but upon information of his death, which she believed upon reasonable grounds to be true. On appeal nine out of fifteen judges were of opinion that the conviction should be quashed, the majority holding, upon somewhat different reasoning, that the language of the statute did not exclude the application of the common-law doctrine that mere ignorance or mistake of fact is a defense. The minority based their judgment upon the plain and explicit language of the statute as conclusive evidence of the intention of the Legislature. Other courts, under similar statutes, have taken the view supported by the minority in the case just referred to.[2] "It appears to us," said Shaw, C. J., in

[2] Com. v. Mash, 7 Metc. (Mass.) 472; Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800. On prosecution for adultery the fact that defendant believed that the woman was not in fact married to the alleged former husband, if she was so married, was no defense. Owens v. State, 94 Ala. 97, 10 South. 669. Cf. State v. Goodenow, 65 Me. 30. But a woman marrying is not guilty if she did not know of the man's former marriage. Vaughan v. State, 83 Ala. 55, 3 South. 530. Where a man, who had married a woman whose husband was living, was indicted for adultery, and it appeared that the former husband had been absent for the full seven years covered by the exception in the statute against bigamy, it was held that, if defendant believed him dead, he was not guilty, since the statute, though not in terms applicable to adultery, recognized the common-law rule that upon a person's leaving home for temporary purposes, and not being heard of or known to be living for seven years, the presumption of death arises, and this rule should operate as a defense. Com. v. Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653. But where it appeared on a

such a case,[3] "that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage while the former husband or wife is in fact living depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death."

ACCIDENT OR MISFORTUNE

37. A person is not criminally liable for an accident happening in the performance of a lawful act with due care.

The ground of this exemption from responsibility is the absence of will. The law does not punish one for his involuntary acts unless he is negligent. The accident, however, must happen in doing a lawful act. If it happen while the accused is engaged in the commission of another crime, there is no exemption. Thus, if a person, intending to kill one person, accidentally kills another,[4] or if he accidentally kills a person in attempting to rob or commit any other felony,[5] the fact that the killing was accidental is no excuse. So if a person accidentally kills another while engaged in mutual combat, amounting to a breach of the peace, he is guilty of manslaughter if he was voluntarily fighting, as the fighting is an unlawful act; but if he did not wish to fight, and was merely defending himself, as he

second trial that the woman's husband had not left her, but she had deserted him, the presumption did not apply, and defendant's belief in the husband's death was no defense. Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

[3] Com. v. Mash, supra.

[4] Saunders' Case, 2 Plowd. 473; Gore's Case, 9 Coke, 81. See 4 Bl. Comm. 26, 27.

[5] Post, p. 211.

had a right to do, he is excused on the ground of accident.[6] Even if the accident happen in the doing of a lawful act, the person so causing it is liable if he failed to use proper care.[7] This ground of exemption will be more fully explained in treating of the specific crimes of assault and battery and homicide.

JUSTIFICATION

38. The law, on the ground of public policy, imposes the duty or allows the doing of certain acts, under certain circumstances although individuals are injured thereby. In such cases the acts are not criminal, but are justifiable. Such are certain acts done—

(a) Under public authority.
(b) Under parental authority.
(c) In prevention of crime.
(d) In suppressing a riot.
(e) In defense of person or property.
(f) In making an arrest or preventing an escape.

In General

Questions of justification usually arise in connection with the right to inflict personal injury or to cause death. For example, homicide may be justifiable in the execution of criminals, in making arrest, in preventing the escape or rescue of a prisoner, in preventing crime, in suppressing riot or affray, in self-defense, in defense of others, or in defense of property. The infliction of bodily injury may be justified under similar circumstances, as well as under some other circumstances—as in the case of correction administered by a

[6] Reg. v. Knock, 14 Cox, Cr. Cas. 1. And see post, pp. 193, 230, and cases cited.

[7] Ante, p. 59. Post, p. 232.

parent to his child, a teacher to his pupil, and the like. Questions of justification of this nature will be considered hereafter, particularly in treating of homicide [8] and assault.[9]

SAME—DURESS

39. The concurrence of the will is in general necessary to make an act criminal. Therefore when one is forced to do an act against his will, he is, in general, not responsible therefor. Therefore, on a prosecution for any crime, except murder, if the accused committed the act only because compelled to do so by threats of death or serious bodily harm, he is excused.

If a man, without fault on his part, is made to do an act under the influence of a force which it is impossible to resist, or, rather, under the influence of such a force is made the involuntary instrument of another's act, he is, of course, not responsible. One is not guilty if a man seizes his hand, and, in spite of his resistance, compels him to kill another, for the act is the act of the man who directs his hand.[10] Did the question stop here, there would be no difficulty; but the law goes farther, and excuses, in certain cases, acts which are not strictly involuntary. If a man's life is threatened or put in danger, or he is threatened with grievous bodily harm, he may, as we shall see, defend himself. But the question here involved is whether reasonable apprehension of death or bodily harm, in case of refusal to obey the command of another to commit a crime, is an excuse for committing the crime.

It is well settled that a man is excused if he commits what would otherwise be a crime other than murder upon

[8] Post, pp. 173, 192. [9] Post, p. 252. [10] East, P. C. 225.

command of another under reasonable apprehension on his part of instant death in case compliance with the command is refused.[*] Such threats and apprehension constitute duress, and excuse him.

On this principle one who through fear of death is compelled to join in a riot,[11] to commit what would otherwise be mutiny,[12] or even treason,[13] is not criminally responsible therefor. Fear of injury to property, or, it seems, of anything short of death, or at least serious personal injury, will not excuse.[14]

Threats in any case, to be an excuse, must be threats of immediate, not future, injury or death.[15] It seems that not even threat of immediate death will excuse the taking of the life of an innocent person.[16]

[11] Rex v. Crutchley, 5 Car. & P. 616.

[12] U. S. v. Haskell, 4 Wash. C. C. 402, Fed. Cas. No. 15,321.

[13] RESPUBLICA v. McCARTY, 2 Dall. (Pa.) 86, 1 L. Ed. 300, Mikell Illus. Cas. Criminal Law, 62; U. S. v. Greiner, 4 Phil. (Pa.) 396, Fed. Cas. No. 15,262; McGrowther's Case, Fost. 13; 18 How. St. Tr. 394.

[14] McGrowther's Case, supra; RESPUBLICA v. McCARTY, 2 Dall. (Pa.) 86, 1 L. Ed. 300, Mikell Illus. Cas. Criminal Law, 62; U. S. v. Vigol, 2 Dall. (Pa.) 346, Fed. Cas. No. 16,621, 1 L. Ed. 409; U. S. v. Haskell, 4 Wash. C. C. 402, Fed. Cas. No. 15,321; Reg. v. Tyler, 8 Car. & P. 616; Rex v. Crutchley, 5 Car. & P. 133; People v. Repke, 103 Mich. 459, 61 N. W. 861. But see, as to threats to do grievous bodily harm, Steph. Dig. Cr. Law, art. 31.

[15] U. S. v. Vigol, 2 Dall. (Pa.) 346, Fed. Cas. No. 16,621, 1 L. Ed. 409; People v. Repke, 103 Mich. 459, 61 N. W. 861; Bain v. State, 67 Miss. 557, 7 South. 408; State v. Fisher, 23 Mont. 540, 59 Pac. 919; State v. Nargashian, 26 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715, 3 Ann. Cas. 1026; Baxter v. People, 8 Ill. (3 Gilman) 368.

[16] Arp v. State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137. Leach v. State, 99 Tenn. 584, 42 S. W. 195. See Pen. Code, Minn. § 23; State v. Nargashian, 26 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715, 3 Ann. Cas. 1026. The accused participated under compulsion in a robbery, which resulted in the commission of a murder by one of his associates. A statute in the jurisdiction made duress a defense for all crimes except murder. It was held that

Same—Command

A mere command, unaccompanied by threats of death or serious bodily harm, is in general no excuse for an act otherwise criminal. If the person giving the command has legal authority to do so, the person acting under such command is, of course, not criminally liable for his act. Thus a sheriff is not guilty of murder in hanging a person lawfully condemned to death by the judge; nor is one guilty of false imprisonment who is employed by the state to confine a prisoner.[17] But if the person giving the command either has no authority to do so, or exceeds his authority, such command is no excuse. Thus, a command by a parent to a child,[18] or a master to a servant,[19] is no excuse for an act done by the child, or servant, if such act would be criminal if done by the parent or master. A command by a superior officer does not excuse an inferior, either in the army or the navy, or in civil life, for committing a criminal act.[20] But it is said that in the case of a private soldier,

he was properly convicted of murder. State v. Moretti, 66 Wash. 537, 120 Pac. 102. "There might be cases, like a panic, where a general fear might not only reduce [from murder to manslaughter], but even excuse, an unlawful act, but * * * if one has sufficient power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor reduction on the ground of fear." Stiness, J., in State v. Nargashian, 26 R. I. 304, 58 Atl. 953, 106 Am. St. Rep. 715, 3 Ann. Cas. 1026.

[17] See Reg. v. Leslie, 8 Cox, Cr. Cas. 269.

[18] 1 Hawk. P. C. c. 1, § 14; People v. Richmond, 29 Cal. 415.

[19] Com. v. Hadley, 11 Metc. (Mass.) 66; Sanders v. State (Tex. Cr. App.) 26 S. W. 62.

[20] U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; U. S. v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732; Com. v. Blodgett, 12 Metc. (Mass.) 56; RIGGS v. STATE, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272, Mikell Illus. Cas. Criminal Law, 63; In re Fair (C. C.) 100 Fed. 149

while he is not excused in carrying out an illegal order of his superior, yet, if such order appear legal on its face, he is bound to obey it, and it will be a protection to him.[21] A somewhat different rule, as will be seen, applies to acts done by a married woman in the presence of her husband.[22]

SAME—COERCION—MARRIED WOMEN

40. If a married woman, in the presence of her husband, commits an act which would be a crime under other circumstances, she is presumed to have acted under her husband's coercion, and such coercion excuses her act,[23] but this presumption may be rebutted if the circumstances show that in fact she was not coerced.

EXCEPTIONS—This rule is subject to exceptions in cases of treason, murder, probably robbery, and of those crimes which are from their nature generally committed by women.

The ground on which a married woman is prima facie not criminally liable for wrongful acts done in the presence of her husband is coercion, it being presumed from the marital

[21] RIGGS v. STATE, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272, Mikell Illus. Cas. Criminal Law, 63. Where a member of the militia, called out to suppress rioting and disorder, without malice, and under the order of an officer, commits a homicide, he is excusable, unless it was manifestly beyond the scope of his authority and he must have known that the act was illegal as a man of ordinary understanding. A soldier is bound to obey the orders of his superior officer, where such orders do not clearly show their own illegality, and such order will be a protection to the soldier. Com. v. Shortall, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759.

[22] Post, § 40.

[23] J. Kel. (A. D. 1664) 31; Reg. v. Dykes, 15 Cox, Cr. Cas. 771; Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; Davis v. State, 15 Ohio,

relation that she acted by his command, and under the impulse of fear. She must, however, have been in his presence, or so near that he could have exerted an immediate influence and control.[24] It is doubtful what crimes are excepted from this rule. It seems, however, that it does not apply to treason, murder, or robbery,[25] nor to crimes of a domestic nature, such as keeping a bawdy house, in which the wife may be supposed to have a principal share.[26] The presumption is always rebuttable by evidence showing that there was no coercion.[27] In one state, at least, this presumption is not recognized, but the burden of proving co-

72, 45 Am. Dec. 559; State v. Kelly, 74 Iowa, 589, 38 N. W. 503; State v. Houston, 29 S. C. 108, 6 S. E. 943. Under Georgia Code, see Bell v. State, 92 Ga. 49, 18 S. E. 186.

[24] Com. v. Butler, 1 Allen (Mass.) 4; Com. v. Feeney, 13 Allen (Mass.) 560; Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Munsey, 112 Mass. 287; State v. Potter, 42 Vt. 495; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684. Mere proximity not sufficient. State v. Shee, 13 R. I. 535; Com. v. Daley, 148 Mass. 11, 18 N. E. 579. Must appear that "violent threats, command, and coercion were used" (under Code). Bell v. State, 92 Ga. 49, 18 S. E. 186.

[25] J. Kel. 31; Bibb v. State, 94 Ala. 31, 10 South. 506, 33 Am. St. Rep. 88; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559. Contra as to robbery. Reg. v. Dykes, 15 Cox, Cr. Cas. 771. And see People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; Miller v. State, 25 Wis. 384; Com. v. Daley, 148 Mass. 11, 18 N. E. 579. No presumption in perjury, where wife testified in favor of husband on indictment against him, she not being compellable to testify. Com. v. Moore, 162 Mass. 441, 38 N. E. 1120.

[26] 4 Bl. Comm. 29; Reg. v. Williams, 10 Mod. 63; even though the husband resided in the house and furnished, and provided for it, Com. v. Cheney, 114 Mass. 281. But see State v. Hoelcher, 163 Mo. App. 352, 143 S. W. 850.

[27] Blakeslee v. Tyler, 55 Conn. 397, 11 Atl. 855; U. S. v. Terry (D. C.) 42 Fed. 317; People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; Com. v. Daley, 148 Mass. 11, 18 N. E. 579; Miller v. State, 25 Wis. 384; State v. Williams, 65 N. C. 400; State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414. By slight circumstances, State v. Cleaves, 59 Me. 302, 8 Am. Rep. 422. May be shown that

ercion is by statute cast upon the wife.[28] This common-law rule as to a married woman's criminal responsibility is not changed by the "married women's acts" in the different states, removing their civil disabilities; but in some states it is expressly enacted that it is no defense that a criminal act was committed by her in the presence of her husband.[29]

SAME—NECESSITY

41. Physical necessity or impossibility is an excuse for failure to perform a duty imposed by law. How far an act which would otherwise be a crime may be excused if done, not in defense, but to avoid otherwise inevitable consequences, which would inflict upon him or others whom he is bound to protect irreparable evil, is doubtful. It seems that no man can, on the plea of necessity, excuse himself for taking the life of an innocent person.

It is doubtful how far the mere pressure of circumstances, as distinct from duress or coercion as above explained (except the circumstances which will be hereafter considered in treating of justification and excuse of homicide and of assault), is a justification for the commission of otherwise criminal acts.[30] It is probably the law that no man can

husband was crippled and incapable of coercion, Reg. v. Pollard, 8 Car. & P. 553.

[28] Freel v. State, 21 Ark. 212; Edwards v. State, 27 Ark. 493.

[29] Pen. Code Minn. § 22.

[30] "An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose;

excuse himself under the plea of necessity for taking the life of an innocent person.[81] Lord Bacon, indeed, in his Maxims, states that: "If divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, * * * and another, to save his life, thrust him from it, whereby he is drowned, this is * * * justifiable."[82] But this statement of the law was disapproved by the English court in a case where it was held that shipwrecked persons, who put to death a boy upon the chance of preserving their lives by feeding upon the body, although otherwise they would probably not have survived, and the boy, being in a weak condition, was likely to have died before them, were guilty of murder.[83] A somewhat similar case had previously arisen in this country, where a sailor was charged with felonious homicide in throwing passengers out of a boat to save his life. The court said that, if two persons who owe no duty to one another, should be placed in a position where both cannot survive, neither would commit a crime in saving his life in a struggle for the only means of safety; but the court held that, as the defendant was a seaman, and the persons thrown out were passengers, the defendant owed them a duty, and was not justified in sacrificing their lives to save his own.[84]

and that the evil inflicted by it was not disproportionate to the evil avoided." Steph. Dig. Cr. Law, art. 32, citing Rex v. Stratton, 21 How. St. Tr. 1045, Bac. Max. No. 5, and (with some adverse comment) U. S. v. Holmes, 1 Wall. Jr. 1, Fed. Cas. No. 15,383. See criticisms upon this article and upon the cases cited by Lord Coleridge in Reg. v. Dudley, 15 Cox, Cr. Cas. 624, 14 Q. B. Div. 273.

[81] Reg. v. Dudley, 15 Cox, Cr. Cas. 624, 14 Q. B. Div. 273; Arp v. State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137. But see U. S. v. Holmes, 1 Wall, Jr. 1, Fed. Cas. No. 15,383.

[82] Bac. Max. No. 5.

[83] Reg. v. Dudley, supra.

[84] U. S. v. Holmes, supra. The court also said: "When a ship is

Lord Bacon also says that, "if a man steals viands to satisfy his present hunger, this is no felony nor larceny";[85] but this is probably not the law at the present day.[86] It has been held, however, on an indictment for retailing spirituous liquors without a license, where it appeared that the sale was made by druggists on a physician's prescription, and was bought, sold, and used in good faith as medicine, that the defendant was not guilty, on the ground that the sale was not within the mischief which the statute was intended to suppress.[87]

It has also been held that one is not guilty of the breach of a statute against stopping vehicles in the street if the one which he was driving was unavoidably stopped by the exigencies of traffic.[88]

Statutes forbidding labor on Sunday usually contain a proviso excepting work of necessity. In such cases a necessity brought about through the negligence of the accused is not an excuse.[89]

Physical necessity or impossibility, however, is an excuse for failure to perform a duty. Thus, where the defendant was indicted for failure to repair a highway which it was his duty to repair, and it appeared that the land over which

in danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary in order to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and in some sort, as an appeal to God for the selection of the victim." "I doubt whether an English court would take this view. It would be odd to say that two men on a raft were bound to toss up as to which should go." Steph. Dig. Cr. Law, art. 32, note 1.

[85] Bac. Max., supra.

[86] 1 Hale, P. C. 54. See opinion of Lord Coleridge in Reg. v. Dudley, supra.

[87] State v. Wray, 72 N. C. 253.

[88] Com. v. Brooks, 99 Mass. 434.

[89] State v. Goff, 20 Ark. 289.

the road passed had been washed away by the sea, it was held that this, being an act of God, relieved him from liability.[40]

PROVOCATION

42. Provocation is no ground for exempting one absolutely from criminal responsibility for his acts, but may be ground for mitigating the punishment.

A person who commits a crime cannot escape liability altogether by showing that he was provoked; but the fact that a crime was committed under provocation may sometimes be ground for inflicting less severe punishment in cases of homicide and assault. The law in these cases regards the infirmities of human nature, and recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, he may strike a blow before he has had time to think and to control himself, and therefore does not punish him so severely as if he had acted deliberately. This is a matter relating more peculiarly to homicide, and will be fully explained when we come to treat of homicide.[41]

[40] Reg. v. Bamber, 5 Q. B. 279. See, also, Com. v. Brooks, 99 Mass. 434.

[41] Post, p. 218.

CHAPTER VI

PARTIES CONCERNED IN THE COMMISSION OF CRIMES

43. Effect of Joining in Criminal Purpose.
44–45. Principals and Accessaries.
46. Principals in the First Degree.
47. Principals in the Second Degree.
48. Accessaries before the Fact.
49. Accessaries after the Fact.
50–51. Use of Terms "Aider and Abettor" and "Accomplice."
52. Principal's Liability for Acts of Agent.
53. Agent's Liability for His Own Acts.

EFFECT OF JOINING IN CRIMINAL PURPOSE

43. Where several persons join in the execution of a common criminal purpose, each is criminally liable for every act done in the execution of that purpose, whether done by himself or by his confederate.[1]

A crime is not always committed by a single individual; several persons may be concerned in different degrees, some of them by actually doing the deed, others by standing by and abetting it, others by having advised or commanded it, though absent when it is committed, and still others by assisting in the escape of one concerned. Whenever persons join for the purpose of executing a common criminal purpose, each one is the agent of the other as to all acts in furtherance thereof, and each is criminally liable for such acts of the others. It is otherwise, however, as to acts not in furtherance of the common purpose. This, of course, does not apply to persons assisting after the act. We will

[1] Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. See, also, post, pp. 115, 120, 162.

now see what these degrees of criminality are, the extent of participation necessary to render one liable, the acts for which each participant is liable, and the nature of his liability.

PRINCIPALS AND ACCESSARIES

44. Parties concerned in the commission of felonies are principals or accessaries according as they are present or absent when the act is committed.

Principals are either:

(1) Principals in the first degree, or

(2) Principals in the second degree.

Accessaries are either:

(1) Accessaries before the fact, or

(2) Accessaries after the fact.

45. The distinction between principals and accessaries is recognized in felonies only.

This distinction between principals and accessaries is recognized in felonies only.[2] The same participation or assistance which in case of a felony would make one an accessary before or after the fact will make him a principal in trea-

[2] 2 Co. Inst. 183; 1 Hale, P. C. 233; 4 Bl. Comm. 35; Reg. v. Clayton, 1 Car. & K. 128; Ward v. People, 6 Hill (N. Y.) 144; Baker v. State, 12 Ohio St. 214; Van Meter v. People, 60 Ill. 168; Stevens v. People, 67 Ill. 587; Stratton v. State, 45 Ind. 468; State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; State v. Murdoch, 71 Me. 454; State v. Lymburn, 1 Brev. (S. C.) 397, 2 Am. Dec. 669; Com. v. Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693; State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459; Engeman v. State, 54 N. J. Law, 247, 23 Atl. 676; Kinnebrew v. State, 80 Ga. 232, 5 S. E. 56. This principle applies to actions for penalties for breach of municipal ordinances. Village of St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

son.[3] In case of a misdemeanor, all those who counsel or abet its commission, and who would be accessaries before the fact if the crime were a felony, are treated as principals;[4] while those who assist after the act, and who would be accessaries after the fact in case of a felony, are not punished at all for the particular misdemeanor. They may, however, be guilty of other substantive crimes, such as rescue and obstructing an officer.

PRINCIPALS IN THE FIRST DEGREE

46. A principal in the first degree is the person who actually perpetrates the deed, either by his own hand or through an innocent agent.[5]

To constitute one a principal in the first degree, he need not necessarily be present when the crime is consummated. One who lays poison [6] or sets a spring gun for another is a principal in the first degree, though he is absent when the poison is drunk or the gun discharged. Nor need he do the deed by his own hand. It may be done through an innocent agent as, for instance, where one incites a child or an insane person to set fire to a house or to kill another, or procures such a person, or a person ignorant of the facts, to administer poison,[7] or to utter a counterfeit bank note or

[3] Reg. v. Tracy, 6 Mod. 30.

[4] Blackstone says that in treason all are principals propter odium delicti, and in misdemeanors, because the law does not descend to distinguish the different degrees of guilt. 4 Bl. Comm. 36.

[5] 4 Bl. Comm. 34, 35; 1 Hale, P. C. 615.

[6] 3 Co. Inst. 138; Fost. Crown Law, 349; State v. Fulkerson, 61 N. C. 233; Blackburn v. State, 23 Ohio St. 146.

[7] Reg. v. Michael, 2 Moody, Cr. Cas. 120; Collins v. State, 3 Heisk. (Tenn.) 14.

a forged instrument.[8] The term "innocent agent" is not confined to one morally innocent; it embraces any agent not himself legally responsible for the act.

Thus, in those jurisdictions where it is held that a woman cannot be convicted of larceny of her husband's property, one who procures her to decamp with her husband's goods is a principal in the first degree, though he is absent when the act is done.[9] Where a child is employed to do the act, the question whether the employer is guilty as a principal in the first degree depends on whether the child is himself legally responsible.[10] If the agent is legally responsible for his own acts, the instigator is only an accessary before the fact, if he is absent when the crime is committed. When one acts through an agent, he can himself be guilty as a principal in the first degree only where the agent is innocent.[11] Where several persons each perform some one or more of a series of acts necessary to constitute the crime intended, as in case of counterfeiting or forging, all are joint principals in the first degree, though some may be absent when the final act is done.[12] A person in one state,

[8] Reg. v. Taylor, 4 Fost. & F. 511; Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34. Procuring instrument to be forged, or die made for counterfeiting, Reg. v. Banner, 2 Moody, Cr. Cas. 309; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774; State v. Shurtliff, 18 Me. 368. Procuring child to commit burglary or larceny, REG. v. MANLEY, 1 Cox, Cr. Cas. 104, Mikell Illus. Cas. Criminal Law, 70; State v. Learnard, 41 Vt. 585. Obtaining property by false pretenses, through innocent agent, Adams v. People, 1 N. Y. 173.

[9] Reg. v. Flatman, 14 Cox, C. C. 396.

[10] See, ante, p. 58.

[11] Wixson v. People, 5 Parker, Cr. R. (N. Y.) 129.

[12] Rex v. Bingley, Russ. & R. 446; Rex v. Kirkwood, 1 Moody, Cr. Cas. 304. Stealing property, carrying away part in confederate's absence, Reg. v. Kelly, 2 Car. & K. 379. Uttering forged checks, Mason v. State, 31 Tex. Cr. R. 306, 20 S. W. 564.

committing an act in another state through an innocent agent, is liable, as having himself committed the act in the latter state.[13]

PRINCIPALS IN THE SECOND DEGREE

47. A principal in the second degree is one who is actually or constructively present, aiding and abetting another in the commission of the deed.[14]

(a) He must be present, actually or constructively, and

(b) He must aid or abet the commission of the act.

(c) There must be community of unlawful purpose at the time the act is committed.

(d) Such purpose must be real on the part of the principal in the first degree.

Constructive Presence

Though presence at the time the deed is done is essential to make one a principal in the second degree,[15] his presence may be constructive.[16] He need not be an eye and ear witness to the deed. Thus, if a person intends to assist, and is sufficiently near to do so, as where he is watching outside a house, while another is committing a burglary or other felony inside, he is regarded as being present.[17]

[13] People v. Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468. See Clark, Cr. Proc. 14.

[14] 4 Bl. Comm. 34, 35; 1 Hale, P. C. 615.

[15] Rex v. Soares, Russ. & R. 25; Wixson v. People, 5 Parker, Cr. R. (N. Y.) 129.

[16] Fost. Crown Law, 349, 350; U. S. v. Boyd (C. C.) 45 Fed. 851, at page 867.

[17] Com. v. Knapp, 9 Pick. (Mass.) 496, at page 516, 20 Am. Dec. 491; Tate v. State, 6 Blackf. (Ind.) 110; Doan v. State, 26 Ind. 495; Mitchell v. Com., 33 Grat. (Va.) 845; Collins v. State, 88 Ga. 347, 14 S. E. 474; People v. Repke, 103 Mich. 459, 61 N. W. 861; Com. v. Clune, 162 Mass. 206, 38 N. E. 435.

So, also, if he is within a convenient distance, with intent to aid in a murder if his aid is necessary.[18] For the purpose of robbing a stage, a person signaled his confederates, to inform them of its approach, by lighting a fire on a distant mountain. He was held to have been constructively present, and a principal in the second degree.[19] So, also, where a person decoyed the owner of a house to another place, and detained him there while his confederates committed a burglary in the house.[20] A person, if present, must be a principal, if guilty at all. He cannot be an accessary;[21] for, as we shall see, absence is essential to make one an accessary.

Aiding and Abetting

To aid or abet the commission of a crime is to assist or encourage the actual perpetrator. There must be some participation.[22] Mere presence and neglect to endeavor to

[18] State v. Chastain, 104 N. C. 900, 10 S. E. 519.

[19] State v. Hamilton, 13 Nev. 386.

[20] Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340.

[21] Williams v. State, 47 Ind. 568.

[22] A boy was negligently shot by one of several persons who went out together to shoot at a mark. The others were held liable as principals in the second degree. Reg. v. Salmon, 6 Q. B. Div. 79. Picking of a pocket by one of several confederates, Com. v. Fortune, 105 Mass. 592. And see, for larceny from the person, People v. Sligh, 48 Mich. 54, 11 N. W. 782; encouraging obstruction of railroad track, State v. Douglass (Kan.) 24 Pac. 1118; murder, commanding another to shoot, State v. Noeninger, 108 Mo. 166, 18 S. W. 990; preparing to receive property to be stolen, and receiving the same (under statute), Watson v. State, 21 Tex. App. 598, 17 S. W. 550; Montgomery v. State (Tex. Cr. App.) 23 S. W. 693. And see Wixson v. People, 5 Parker, Cr. R. (N. Y.) 119. A female friend who accompanies the woman is not an accomplice in abortion, People v. McGonegal, 136 N. Y. 62, 32 N. E. 616. Alder actuated by threats and fear, danger must be to life or member, and must be present and immediate. Burns v. State, 89 Ga. 527, 15 S. E. 748. But a prisoner who accepts the aid of another person in effecting an escape

prevent a felony will not of itself make one a principal in the second degree;[23] and this is true even though the person so present is to be benefited by the deed. Presence, under such circumstances, however, might raise the presumption of participation.[24] Nor will mere mental approval or sympathy make one guilty.[25] The assistance need not be physical. It may consist in mere encouragement to do the act.[26] Thus, it is sufficient to make one a principal if

does not aid and abet in his own escape, Ash v. State, 81 Ala. 76, 1 South. 558; nor is a woman on whom an abortion is committed a principal in the crime, Peoples v. Com., 87 Ky. 487, 9 S. W. 509. Where a statute forbids the sale of lottery tickets, one who buys such tickets does not aid and abet the sale, People v. Emerson (Sup.) 5 N. Y. Supp. 374; nor does a purchaser of liquor aid and abet the seller, People v. Smith, 28 Hun (N. Y.) 627; Com. v. Willard, 22 Pick. (Mass.) 476; State v. Baden, 37 Minn. 212, 34 N. W. 24.

[23] Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370; Hilmes v. Stroebel, 59 Wis. 74, 17 N. W. 539; People v. Ah Ping, 27 Cal. 489; People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176; Clem v. State, 33 Ind. 418; State v. Farr, 33 Iowa, 553; State v. Hildreth, 31 N. C. 440, 51 Am. Dec. 369; State v. Douglass, 44 Kan. 618, 26 Pac. 476; Goins v. State, 46 Ohio St. 457, 21 N. E. 476; REG. v. CONEY, 8 Q. B. Div. 534, Mikell Illus. Cas. Criminal Law, 5; State v. Wolf, 112 Iowa, 458, 84 N. W. 536.

[24] Com. v. Stevens, 10 Mass. 181. A statute of Colorado (Gen. St. 1883, § 701) provides that one is an accessary during the fact who stands by, without interfering or giving such help as may be in his or her power, to prevent a criminal offense from being committed.

[25] White v. People, 81 Ill. 333; State v. Cox, 65 Mo. 29; Clem v. State, 33 Ind. 418; True v. Com., 90 Ky. 651, 14 S. W. 684.

[26] McMahon v. State, 168 Ala. 70, 53 South. 89; Mitchell v. Com. (Ky.) 14 S. W. 489. In People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857, the prisoner, desiring to obtain a divorce, agreed with one R. that R. should persuade the prisoner's wife to have intercourse with R. The prisoner concealed himself in an adjoining room. R. failed to persuade the wife and so raped her; the prisoner witnessing the wife's struggles. Held, the prisoner was a principal in the second degree. The court said: "The husband was not a mere passive looker-on. * * * When the wife screamed, and respondent did not interfere, he (R.) knew that the husband was

he watches so as to warn the person actually committing the deed, or if he is present, or near by, to the actual perpetrator's knowledge, with an intention of assisting him if necessary.[27] One may be guilty as principal in the second degree though he could not possibly perpetrate the deed himself. A woman, for instance, may be so guilty of rape if she encourages another to commit it.[28]

Community of Unlawful Purpose

As stated in the black-letter text, there must also be a community of unlawful purpose at the time the act is committed; for one is not responsible for the act of another unless he expressly or impliedly authorized the other to do that act.[29] Acts done by one of a party, but not in pursuance of the arrangement, will not, therefore, render the others liable as principals.[30] Thus, if two persons start out to commit a burglary or robbery, and on the way one of them kills a man,[31] or sets fire to a house, the other, not having contemplated such an act, is not a principal.[32]

willing he should succeed in the accomplishment of the intercourse by force, if necessary. * * * And the presence of the husband in the next room, waiting to catch the parties together, * * * imparted to him a confidence in his undertaking."

[27] See cases cited in foot notes 17 and 18.

[28] State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; Kessler v. Com., 12 Bush (Ky.) 18.

[29] Intention not communicated to principal in first degree is not sufficient. White v. People, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196. The common purpose need not be formed before convening at place of crime. Amos v. State, 83 Ala. 1, 3 South. 749, 3 Am. St. Rep. 682; McCoy v. State, 91 Miss. 257, 44 South. 815.

[30] Ferguson v. State, 32 Ga. 658. Two joining to commit assault, one is not liable for robbery done by the other. People v. Foley, 59 Mich. 553, 26 N. W. 699; Omer v. Com., 95 Ky. 353, 25 S. W. 594; State v. May, 142 Mo. 135, 43 S. W. 637.

[31] Duffey's Case, 1 Lewin, Cr. Cas. 194.

[32] Rex v. White, Russ. & R. 99; Lamb v. People, 96 Ill. 73; People

It is not necessary, however, to show that one expressly authorized the other to do the act; if the act done by one were within the purview of the common design, or even, perhaps, if it were a natural and probable consequence of the common unlawful purpose, they are equally liable.[88] Thus, where two persons start out to commit a burglary or robbery, and, encountering resistance from the owner of the house or person to be robbed, one of them kills him, the

v. Knapp, 26 Mich. 112. Where the defendant and others went armed to commit a burglary, but abandoned the plan, and on their way back met a policeman, who apparently undertook to arrest and search them, and in the mêlée which ensued the officer was killed, the court affirmed a conviction of murder in the first degree, holding that the evidence of preparations to kill made in connection with the proposed burglary was sufficient proof of deliberate purpose. People v. Woods, 147 Cal. 265, 81 Pac. 652, 109 Am. St. Rep. 151.

[88] Martin v. State, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91; Williams v. State, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133; State v. Johnson, 7 Or. 210. Several defendants conspired with one another to upset a bakery wagon owned by a baker whose employés were on strike, and destroy the contents, and that K., one of the conspirators, should beat the driver. On the arrival of the wagon K. shot and killed the driver. It was held that the other conspirators were guilty of murder, though they did not know that K. was armed. People v. Gukouski, 250 Ill. 231, 95 N. E. 153, Ann. Cas. 1912B, 297. "The prisoners may be guilty of murder, though they neither took part in the killing, nor assented to any arrangement having for its object the death of [the deceased]. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob [the deceased], and that he was killed in the attempt to execute the common purpose." Brennan v. People, 15 Ill. 511. In State v. Darling, 216 Mo. 450, 115 S. W. 1002, 23 L. R. A. (N. S.) 272, 129 Am. St. Rep. 526, defendant conspired with his brother merely to whip the deceased. The brother struck deceased with a piece of iron which he had concealed in his hand. Defendant did not know that his brother intended to use the iron on deceased. The court held that defendant was guilty of homicide. See, further, 57 Univ. of Pa. L. Rev. 635.

other is a principal in the murder.[84] So, also, where several persons start out to beat a man, and one of them kills him, they are all principals.[85] The community of unlawful purpose must exist at the time the felony is committed. If one joins in an agreement to murder, but, before the deed is committed, repents, and notifies his confederates of that fact,[86] he is not a principal in the murder. Nor is one a principal who, after a robbery has been committed, and the stolen property has been carried some distance, is told of the robbery, and helps carry the property away, as the robbery is complete before he assists.[87]

As stated in the black-letter text, the unlawful purpose must be real on the part of the principal in the first degree; that is, it must be such that, when he perpetrates the deed, he himself will also be criminally liable. This question will arise where a person apparently enters into a confederacy for the purpose of entrapping his confederate, and is not guilty when he commits the act, because of his want of criminal intent.[88] A person joining another for the pur-

[84] Fost. Crown Law, 369; Reg. v. Jackson, 7 Cox, Cr. Cas. 357; Ruloff v. People, 45 N. Y. 213; Miller v. State, 25 Wis. 384; Mitchell v. Com., 33 Grat. (Va.) 845; State v. Barrett, 40 Minn. 77, 41 N. W. 463; Brennan v. People, 15 Ill. 511; State v. Johnson, 7 Or. 210; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[85] Peden v. State, 61 Miss. 268. Common purpose to kill one man; all guilty if one of them, in the attempt, kills the wrong man. State v. Johnson, 7 Or. 210. Person becoming involved in a fight not on that ground alone an aider and abettor of a homicide by another person. Woolweaver v. State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667.

[86] STATE v. ALLEN, 47 Conn. 121, Mikell Illus. Cas. Criminal Law, 75.

[87] Rex v. King, Russ. & R. 332.

[88] Ante, p. 12, and cases cited. People v. Collins, 53 Cal. 185; State v. Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360; State v. Jansen, 22 Kan. 498.

pose of entrapping, as in the case of detectives, does not become a principal in the second degree, nor accessary before the fact, when the crime is committed by his confederate.[39] Where a specific intent is an essential ingredient of the crime with which one is charged as principal in the second degree, as, for instance, in assault with intent to murder, it must be shown that the accused knew that the principal in the first degree had such an intent. It is not enough to show that he aided him in his act.[40]

Punishment and Procedure

This distinction between principals in the first and in the second degree has almost become obsolete. There are, however, in some states statutes prescribing different punishments; and, where such is the case, a principal in the second degree must be indicted and tried as such. In the absence of such a statute, the distinction need not be made, and one may be indicted as a principal in the first degree, and convicted as a principal in the second degree, and vice

[39] People v. Barric, 49 Cal. 342; People v. Bolanger, 71 Cal. 17, 11 Pac. 799; Price v. People, 109 Ill. 109; Campbell v. Com., 84 Pa. 187; Com. v. Downing, 4 Gray (Mass.) 29; State v. Anone, 2 Nott & McC. (S. C.) 27; Com. v. Hollister, 157 Pa. 13, 27 Atl. 386, 25 L. R. A. 349; State v. McKean, 36 Iowa, 343, 14 Am. Rep. 530; State v. Beaucleigh, 92 Mo. 490, 4 S. W. 666. Policeman frequenting gaming house, and afterwards exposing it, not an accomplice. Com. v. Baker, 155 Mass. 287, 29 N. E. 512. Where A. received money from B. to make an illegal purchase of whisky from Y., and, at the request of the deputy sheriff, who promised him immunity, made the purchase in order to acquire evidence against Y., it was held that he might be convicted under a statute making it a crime to act as agent of the buyer in an unlawful sale of intoxicating liquor. Brantley v. State (Miss.) 65 South. 512.

[40] Reg. v. Cruse, 8 Car. & P. 546; State v. Taylor, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648. And see Meister v. People, 31 Mich. 99.

versa.[41] A principal in the second degree may be punished before the principal in the first degree has been tried;[42] and it seems that he may be convicted of a higher offense than the principal in the first degree—of murder, for instance, where the latter has been convicted of manslaughter only.[43]

ACCESSARIES BEFORE THE FACT

48. An accessary before the fact is one who was absent when the act was committed, but who procured, counseled, commanded, or abetted the principal or actual doer of the act to commit it.[44]

To be an accessary before the fact the accused must have been absent when the crime was committed by the principal. If he were even constructively present, he would be a principal in the second degree.[45]

To abet a crime is to incite or set another on to commit it, and includes procuring, counseling, and commanding its commission. There must be some participation or instiga-

[41] Huffman v. Com., 6 Rand. (Va.) 685; Warden v. State, 24 Ohio St. 143; Williams v. State, 47 Ind. 568; Com. v. Fortune, 105 Mass. 592; Hill v. State, 28 Ga. 604; Leonard v. State, 77 Ga. 764; Collins v. State, 88 Ga. 347, 14 S. E. 474; State v. Ross, 29 Mo. 32; People v. Ah Fat, 48 Cal. 62; State v. Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583; People v. Wright, 90 Mich. 362, 51 N. W. 517; Benge v. Com., 92 Ky. 1, 17 S. W. 146; Albritton v. State, 32 Fla. 358, 13 South. 955; Clark, Cr. Proc. 156.

[42] Brown v. State, 28 Ga. 216; Searles v. State, 6 Ohio Cir. Ct. R. 331; State v. Anderson, 89 Mo. 312, 1 S. W. 135.

[43] Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

[44] 2 Hawk. P. C. c. 29, § 16; Reg. v. Brown, 14 Cox, Cr. Cas. 144.

[45] Williams v. State, 47 Ind. 568; Reg. v. Brown, 14 Cox, Cr. Cas. 144; Rex v. Kelly, Russ. & Ry. 421. Compare Atterberry v. State, 56 Ark. 515, 20 S. W. 411.

tion to make one an accessary. Mere previous knowledge and approval is not enough.[46] The bare concealment of the fact that a felony is about to be committed,[47] or the failure to endeavor to prevent it, is not sufficient, although it may make one guilty of a substantive crime. But it is not essential that the accessary partake of the fruits of the crime.[48] While there must be some communication between an accessary and the principal, it need not be direct, but may be through a third person, as where one procures another to procure a third person to commit a crime; and in such case it is not even necessary that he know who the third person is to be.[49] Nor does it make any difference how long a time may elapse between the counsel or command and the commission of the act, so long as the counsel or command instigates the commission.

For What Acts Accessary Answerable

A person is answerable as accessary before the fact for all probable consequences which ensue from his counsel or command to do an unlawful act, but he is not liable if the act done is essentially different from that counseled or commanded.[50] Thus, if one counsel another to beat a person, and the beating results in death, the person so counseling is

[46] People v. McGuire, 135 N. Y. 639, 32 N. E. 146.

[47] Smith v. State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; State v. Roberts, 15 Or. 187, 13 Pac. 896; Edmonson v. State, 51 Ark. 115, 10 S. W. 21; Alford v. State, 31 Tex. Cr. R. 209, 20 S. W. 553; Elizando v. State, 31 Tex. Cr. R. 237, 20 S. W. 560.

[48] Com. v. Hollister, 157 Pa. 13, 27 Atl. 386, 25 L. R. A. 349.

[49] Rex v. Cooper, 5 Car. & P. 535; Rex v. Kirkwood, 1 Moody, Cr. Cas. 304.

[50] The doctrine as to community of purpose is discussed in reference to principals in the second degree, and is equally applicable to accessaries before the fact. See ante, p. 115, and the cases cited. See, also, State v. Lucas, 55 Iowa, 321, 7 N. W. 583.

an accessary to the killing; but one who commands the burning of another's house is not liable as an accessary if the person commanded breaks into the house and steals therefrom; nor is one counseling an assault and maiming of a woman liable for a rape committed on her by the person counseled.[51] A mere difference, however, in the manner of doing the felony commanded, does not exempt from liability as accessary, if the felony is the same in substance. Thus, one counseling the killing of another by shooting is an accessary, though the killing is done with a knife or by poison.[52] But if a person advises another to give poison to a particular person, and it is given to a different person, he is not an accessary to the murder.[53] There can be no accessary to a felony unless the felony is in fact committed,[54] though the adviser may be punished for soliciting its commission,[55] or for conspiracy.[56] It is sometimes said that there cannot be an accessary before the fact to manslaughter, as manslaughter is a crime which must necessarily be committed without premeditation. This is no doubt true where the manslaughter is intentional, as in case of a killing in heat of passion caused by provocation;[57] but there is no reason why there may not be an accessary to manslaughter unintentionally committed in doing an unlawful act.[58]

It is not necessary that the words or acts of the accessary should directly incite or expressly command the principal to commit the crime; it is sufficient if the acts or words used by the accessary were intended to secure the doing of the act, and that they effected that result.[59]

[51] Watts v. State, 5 W. Va. 532.
[52] Fost. Cr. Law, 370; Griffith v. State, 90 Ala. 583, 8 South. 812.
[53] 1 Hale, P. C. 618; Saunders' Case, 2 Plowd. 473.
[54] Reg. v. Gregory, L. R. 1 Cr. Cas. 79.
[55] Post, p. 152.
[56] Post, p. 154.
[57] Post, p. 218.
[58] Post, p. 238.
[59] Sage v. State, 127 Ind. 15, 26 N. E. 667.

Repentance and Withdrawal

The fact that one who has counseled the commission of a crime, or agreed to take part in it, repents, and withdraws his advice, and abandons the purpose, may or may not relieve him from liability. If he does so when it is too late to notify the principal of such withdrawal, he is nevertheless guilty as accessary, but if he does so before his advice is acted on in any way, or if he does all in his power to prevent it, and his efforts are unavailing because some new cause intervenes, he is not guilty. Such notification may be by words or by acts; and if the words or acts are such as would ordinarily convey his intention to withdraw to the principal, he is not liable for further acts of the principal, whether they actually produced on the mind of the principal the effect which he intended to convey or not.[60] Mere disapproval, however, after having counseled a crime, without any effort to prevent its consummation, or mere withdrawal without the knowledge of his confederate, will not relieve him.[61] The above rules apply to principals in the second degree also.

Punishment and Procedure

At common law, an accessary before the fact must be indicted and prosecuted as such, and this is true even where by statute he is made punishable as principal;[62] but in some states there are statutes which provide that an acces-

[60] STATE v. ALLEN, 47 Conn. 121, Mikell Illus. Cas. Criminal Law, 75.

[61] STATE v. ALLEN, 47 Conn. 121, Mikell Illus. Cas. Criminal Law, 75; Pinkard v. State, 30 Ga. 757.

[62] Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410; Meister v. People, 31 Mich. 99; State v. Larkin, 49 N. H. 39; Walrath v. State, 8 Neb. 80; Hughes v. State, 12 Ala. 458; Josephine v. State, 39 Miss. 613; State v. Dewer, 65 N. C. 572; People v. Trim, 39 Cal. 75; People v. Campbell, 40 Cal. 129.

sary before the fact shall be deemed a principal, and may be tried, convicted, and punished as such. In this case, he may be indicted and convicted as principal, the distinction being abolished.[63] An accessary cannot be put upon his trial, at common law, except by his own consent, until the conviction of the principal; or, at least, jointly with the principal, and the latter must be first convicted; and if the principal is dead, or cannot be apprehended, the accessary cannot be punished at all.[64] Where, however, the distinction has been abolished by statute, as it has been now in most of the states, an accessary may be tried without regard to the principal.[65] An accessary, in any event, may be tried and convicted when one of several principals named in the indictment has been convicted, but at common law he must be tried as accessary to that principal only.[66] An accessary

[63] Campbell v. Com., 84 Pa. 187; People v. Davidson, 5 Cal. 134; State v. Zelbart, 40 Iowa, 169; State v. Pugsley, 75 Iowa, 742, 38 N. W. 498; Dempsey v. People, 47 Ill. 323; Coates v. People, 72 Ill. 304; State v. Beebe, 17 Minn. 241 (Gil. 218); Pettes v. Com., 126 Mass. 242; Wade v. State, 71 Ind. 535; Shannon v. People, 5 Mich. 71; Smith v. State, 21 Tex. App. 107, 17 S. W. 552; State v. Orrick, 106 Mo. 111, 17 S. W. 176; People v. Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701; State v. Patterson, 52 Kan. 335, 34 Pac. 784.

[64] Com. v. Phillips, 16 Mass. 423; Stoops v. Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482; Brown v. State, 18 Ohio St. 496, at page 508; U. S. v. Crane, 4 McLean, 317, Fed. Cas. No. 14,888; Whitehead v. State, 4 Humph. (Tenn.) 278. Plea of guilty by principal, withdrawal after accessaries' conviction, Groves v. State, 76 Ga. 808.

[65] Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754; Pettes v. Com., 126 Mass. 242; Hatchett v. Com., 75 Va. 925; Brown v. State, 18 Ohio St. 496, at page 508; Goins v. State, 46 Ohio St. 457, 21 N. E. 476; Buck v. Com., 107 Pa. 486; Ulmer v. State, 14 Ind. 52. The guilt of the principal, however, must be established, Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754; Hatchett v. Com., 75 Va. 925; Buck v. Com., 107 Pa. 486.

[66] Starin v. People, 45 N. Y. 333; Com. v. Knapp, 10 Pick. (Mass.)

cannot be convicted of a higher offense than the principal;[67] and, if the principal is acquitted, he cannot be convicted at all.[68] This, of course, applies equally to accessaries after the fact.

ACCESSARIES AFTER THE FACT

49. An accessary after the fact is one who receives, relieves, comforts, or assists another, knowing that he has committed a felony.[69] Three things are necessary:

(a) The felony must have been completed.

(b) The person charged as accessary must have done some act to assist the felon personally.

(c) He must have known at the time he assisted the felon that he had committed a felony.

To make one an accessary after the fact, it will suffice if any assistance has been given to the felon personally in order to hinder the felon's apprehension or conviction. Thus, a person who, knowing that another has committed a fel-

477, 20 Am. Dec. 534; Stoops v. Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482.

[67] Buck v. Com., 107 Pa. 486. Contra, under statutes, Goins v. State, 46 Ohio St. 457, 21 N. E. 476; State v. Patterson, 52 Kan. 335, 34 Pac. 784.

[68] McCarty v. State, 44 Ind. 214, 15 Am. Rep. 232; Bowen v. State, 25 Fla. 645, 6 South. 459. Contra, State v. Bogue, 52 Kan. 79, 34 Pac. 410.

[69] 4 Bl. Comm. 37; 1 Hale, P. C. 618; 2 Hawk. P. C. c. 29, § 26 et seq. To convict a person of being accessary after the fact to a felony, it must be proved that the party charged, at the time he rendered the forbidden aid or assistance to the felon, knew that he had committed a felony, or was an accessary before the fact to a felony, and that the aid or assistance given was done with the intention and for the purpose of helping the felon to avoid or escape detection, arrest, trial, or punishment. Whorley v. State, 45 Fla. 123, 33 South. 849.

ony, conceals him,[70] or furnishes him with a horse or money, or other means for flight, or, if he has been arrested, aids in his escape, is an accessary after the fact.[71] Merely suffering a felon to escape, by taking no steps to detain him or to notify the authorities, does not make one an accessary; nor do acts of charity which merely relieve or comfort a felon, and do not hinder his apprehension and conviction or aid his escape.[72] It is essential that the assistance shall be rendered to the felon personally,[73] and there must in all cases be knowledge that the person has committed a felony. Mere suspicion is not enough.[74] Furthermore, the felony must be completed at the time the assistance is rendered. To render assistance to a person after he has struck a mortal blow, but before death has resulted therefrom, does not make one an accessary to the homicide, though it may make him an accessary to the assault with intent to kill.[75] It is

[70] Wren v. Com., 26 Grat. (Va.) 952.

[71] Com. v. Filburn, 119 Mass. 297; Tully v. Com., 11 Bush (Ky.) 154.

[72] 4 Bl. Comm. 38; Wren v. Com., 26 Grat. (Va.) 952; People v. Dunn, 53 Hun, 381, 6 N. Y. Supp. 805. By statute in some states mere failure to report a crime known to have been committed will make one an accessary after the fact. See Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410. But see White v. People, 81 Ill. 333.

[73] It has been held that merely persuading witnesses not to appear against a felon does not constitute one an accessary after the fact. Reg. v. Roberts, 3 Co. Inst. 138. But fabricating testimony to procure acquittal has been held sufficient. Blakely v. State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912. The false witnesses in such case are accomplices of person fabricating testimony. Id. Where one aids another to escape because of threats of injury, the danger must threaten life or limb, and must be present and immediate. Burns v. State, 89 Ga. 527, 15 S. E. 748. Receiving stolen goods does not make the receiver accessary. Loyd v. State, 42 Ga. 221.

[74] Harrel v. State, 39 Miss. 702, 80 Am. Dec. 95; Wren v. Com., 26 Grat. (Va.) 952; State v. Empey, 79 Iowa, 460, 44 N. W. 707; Com. v. Filburn, 119 Mass. 297.

[75] Harrel v. State, 39 Miss. 702, 80 Am. Dec. 95.

not necessary that the accessary aid the felon directly; if he employ another to aid him, it is sufficient.[76]

Persons in Family Relation

A wife, being considered as under her husband's control, is not liable as an accessary for concealing or assisting him when he has committed a felony;[77] but a husband cannot assist his wife, nor a parent his child. No other relation than that of wife excuses at common law.[78] Modern statutes have added to the common-law exception in favor of the wife other near relations.[79]

Punishment and Procedure

Under the common law, harsh as the rule may seem, an accessary after the fact is liable to the same punishment as the principal,[80] but this is almost universally changed by statutes prescribing a lighter punishment. Further than this, many acts of assistance which at common law would make one an accessary after the fact are by statute made substantive crimes, such as obstructing justice. An accessary after the fact must be indicted and prosecuted as such. He cannot at common law be convicted on an indictment charging him as principal.[81] Nor, at common law, can an

[76] Rex v. Jarvis, 2 Moo. & R. 40.

[77] State v. Kelly, 74 Iowa, 589, 38 N. W. 503.

[78] 4 Bl. Comm. 39.

[79] The Rhode Island statute excepts husband, wife, parent, grandparent, child, grandchild, brother, and sister by consanguinity or affinity. Pub. St. 1882, c. 247, § 8.

[80] 4 Bl. Comm. 39.

[81] Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410; McCoy v. State, 52 Ga. 287; Hughes v. State, 12 Ala. 458; Wade v. State, 71 Ind. 535; State v. Dewer, 65 N. C. 572; People v. Gassaway, 28 Cal. 405. See, also, cases cited, ante, p. 122.

accessary after the fact be punished before trial and conviction of the principal,[82] though this also is to a great extent changed by statute.

USE OF TERMS "AIDER AND ABETTOR" AND "ACCOMPLICE"

50. The term "aider and abettor" applies to principals in the second degree.

51. The term "accomplice" applies to all who take part in the commission of a crime, whether they are principals or accessaries.

The terms "aider and abettor" and "accomplice" are frequently used, and the student should understand their meaning. An abettor, as has been seen, may be either a principal in the second degree, where he is present when the crime is committed, or an accessary before the fact. An aider can only be a principal in the second degree or an accessary after the fact. An aider and abettor, therefore, is a principal in the second degree.[83] An accomplice is any one who is concerned with another in the commission of a crime. Each person concerned is the accomplice of the other, whether he be principal in the first or second degree, or accessary before or after the fact.[84] It has been held, however, in one case at least, that an accessary after the fact is

[82] McCarty v. State, 44 Ind. 214, 15 Am. Rep. 232; Com. v. Knapp, 10 Pick. (Mass.) 479, 20 Am. Dec. 534; Simmons v. State, 4 Ga. 465; Edwards v. State, 80 Ga. 127, 4 S. E. 268.

[83] State v. Empey, 79 Iowa, 460, 44 N. W. 707; Tudor v. Com. (Ky.) 43 S. W. 187.

[84] Black, Law Dict. tit. "Accomplice"; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474. In Texas, the statute makes "accomplice" synonymous with "accessary" only. Phillips v. State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

not an accomplice.[85] When the proof against the accused is the testimony of an accomplice, it is usual for the court to advise the jury not to convict if the evidence is uncorroborated, although the jury may convict upon such evidence.[86] In some states it is provided by statute that there can be no conviction on the uncorroborated testimony of an accomplice.

PRINCIPAL'S LIABILITY FOR ACTS OF AGENT

52. As a rule, no person is criminally liable for the act of another unless he has previously authorized or assented to it; and consequently a principal is not liable for acts of his agents or servants which he did not authorize or assent to, although they are done in the course of the employment.

EXCEPTIONS—(a) In cases of libel and nuisance the principal is liable, under certain circumstances, for the acts of his agents or servants upon the ground of his negligence in failing to exercise proper control over them.

(b) Under some statutes the principal is liable for prohibited acts notwithstanding that they are done by his agents or servants without his authority or contrary to his instructions.

[85] State v. Umble, 115 Mo. 452, 22 S. W. 378. Where a conspiracy is formed to bribe a police officer, and the defendant is used as a "go-between" to carry money to the public officer, the defendant is not an accomplice, though he knows the facts. One, to be an "accomplice," must be so connected with a crime that at the common law he might have been convicted as principal, or as an accessary before the fact. People v. Sweeney, 213 N. Y. 37, 106 N. E. 915.

[86] Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. v. Hayes, 140 Mass. 366, 5 N. E. 264; Ingalls v. State, 48 Wis. 647, 4 N. W. 785.

In General

We have already seen that one who, by direct command or procurement, causes a criminal act to be committed by an innocent agent, is regarded as having himself committed it, and is liable as a principal in the first degree. We have also seen that, if the agent is himself guilty, the person procuring the act to be committed is, in case of felonies, a principal in the second degree, or an accessary before the fact, according as he is present or absent at the commission of the act,[87] and, in case of misdemeanors, a principal in either case.[88] We shall now see that a master or other principal is criminally liable in some cases for the acts and omissions of his servant or agent, though not expressly commanded by him.

As a rule, the principal or master is not criminally liable for the acts of his agent or servant if he has not previously authorized or assented to them.[89] The doctrine applied in civil cases, that ratification is equivalent to previous authority, has no application in criminal law.[90] Nor does the mere fact that the act was done by the servant or agent in the course of his employment, as in civil cases, render the employer responsible for it.[91] Criminal responsibility must

[87] See Bish. New Cr. Proc. § 1169. Ante, pp. 112, 119.

[88] Ante, p. 110.

[89] Chisholm v. Doulton, 22 Q. B. Div. 736, 741. See cases generally cited under this discussion. Where owner of a saloon gives, in good faith, instructions to his clerk not to sell liquor to minors, he is not guilty for such sale made by the clerk, if he was not present when such sale was made, and had no knowledge of it. State v. Stike, 149 Mo. App. 104, 129 S. W. 1024.

[90] Morse v. State, 6 Conn. 9. Cf. REG. v. WOODWARD, 9 Cox, Cr. Cas. 95, Mikell Illus. Cas. Criminal Law, 198.

[91] Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Com. v. Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707. Where the servant of a coal dealer, employed to deliver coal, for convenience

rest, except in exceptional cases, upon the ground of assent, for otherwise the mental element necessary to make the act a crime is lacking. We have seen, however, that in some cases a man may be liable criminally for his negligence;[92] and upon this ground, in one or two exceptional cases, a man may be responsible for the acts of his servant or agent to which he has not assented. Moreover, it is in the power of the Legislature to make a man criminally responsible for the acts of other persons whom he has failed to control.

Agent's Act as Evidence of Authority

From the mere fact of employment to conduct a lawful business there can be no presumption that the person employed is authorized to do unlawful acts.[93] It has, however, been frequently declared that under some circumstances the performance of an unlawful act by an agent in the course of his employment upon the employer's premises is enough to raise a presumption of fact that the act was authorized. Thus, where the defendant was indicted for publishing a

in unloading, without the knowledge or authority of his employer, drove upon the sidewalk contrary to law, the employer was not liable. State v. Bacon, 40 Vt. 456. Under a statute making it unlawful "for any person, personally or by agent," to sell liquor under certain circumstances, it was held that defendant could be convicted for a sale made by his partner, in defendant's absence, and without his knowledge or consent. State v. Turner, 54 Ohio Law Bul. 409. And under a statute making it an offense to knowingly sell intoxicating liquor to a minor without the written consent of the parent or guardian, it was held that the owner of a saloon could be convicted for a sale by his bartender though he was absent from the city at the time of the sale and had no knowledge of it, and had instructed his bartender not to sell liquor to minors nor to allow them in the saloon. State v. Constatine, 43 Wash. 102, 86 Pac. 384, 117 Am. St. Rep. 1043 (1906).

[92] Ante, pp. 59, 68, 98; post, p. 232.

[93] Com. v. Briant, supra; State v. Mahoney, 23 Minn. 181; State v. Burke, 15 R. I. 324, 4 Atl. 761.

libel (Junius' Letters) in a magazine which was bought at his shop, and professed to be printed by him, it was held that a sale by the defendant's servant in the shop was prima facie evidence of publication by the master, and that, although it might be contradicted by evidence to show that he was not privy to the publication, and did not assent to or encourage it, it was conclusive until contradicted.[94] So it has been held that a sale of spirituous liquors by a clerk in the absence of the principal, in violation of a statute forbidding sale without license, is prima facie evidence of a sale by the master.[95] It seems, however, that, while such evidence warrants an inference that the act was authorized, which would justify a jury in so finding, it is not correct to hold that this creates a presumption of fact that it was so.[96] That no such presumption is created by a single unlawful sale so made to an habitual drunkard or a minor has been frequently held.[97] Whatever the weight to be given to such evidence, unless it be made conclusive by statute, it may, of course, always be shown that the act was in fact unauthorized, as by the proof of previous general instructions to the contrary;[98] although evidence of such instructions would be immaterial if it appeared that they were merely colora-

[94] Rex v. Almon, 5 Burrows, 2686.

[95] Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Barnes v. State, 19 Conn. 398; Anderson v. State, 22 Ohio St. 305; State v. McCance, 110 Mo. 398, 19 S. W. 648 (under statute providing that agent's sale shall be taken to be act of master); State v. Weber, 111 Mo. 204, 20 S. W. 33; Fullwood v. State, 67 Miss. 554, 7 South. 432.

[96] Com. v. Briant, supra; Com. v. Hayes, 145 Mass. 289, 14 N. E. 151; Com. v. Houle, 147 Mass. 380, 17 N. E. 896; Com. v. Perry, 148 Mass. 160, 19 N. E. 212; Com. v. Hurley, 160 Mass. 10, 35 N. E. 89; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

[97] State v. Mahoney, 23 Minn. 181.

[98] Com. v. Wachendorf, 141 Mass. 270, 4 N. E. 817; Com. v. Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449.

ble, or that the act in question was done with the knowledge or approval of the principal.[9a]

Negligence

. In certain cases, in exception to the general rule, the principal is held criminally liable for the acts of his agent, upon the ground of negligence. Thus, in cases of libel an exceptional responsibility has been held to rest upon booksellers and publishers respecting publications issued from their establishments in the regular course of business; and they have been held criminally liable in such cases, although the particular acts of sale or publication were done without their knowledge. In England, evidence of such a sale or publication was by the early decisions held to be only prima facie evidence of authority;[1] but in later cases it was held conclusive, upon the ground that it was necessary to prevent the escape of the real offender behind an irresponsible party.[2] In this country the liability of the principal in such cases has been placed on the ground of negligence, or of culpable neglect to exercise proper care and supervision over subordinates in the principal's employ. It is therefore competent in defense to show that the unlawful publication was made under such circumstances as to negative any presumption of privity, connivance or want of ordinary care, as by showing that the principal was absent, or confined by sickness, and unable to exercise proper care and supervision.[3]

[9a] State v. Mueller, 38 Minn. 497, 38 N. W. 691.

[1] Rex v. Almon, 5 Burrows, 2686.

[2] Rex v. Gutch, Moody & M. 433; Rex v. Walter, 3 Esp. 21. By statute the accused may show that the publication was made without his authority, and was not due to want of due care or caution. 6 & 7 Vict. c. 96.

[3] Com. v. Morgan, 107 Mass. 199.

So, in cases of nuisance, a large responsibility has been recognized. Thus it has been held that the directors of a company are liable for a common nuisance consisting in polluting the waters of a river, although they were ignorant of what had been done, on the ground that they were answerable for what had been done by their servants, to whom they had given authority to conduct their works.[4] Such a case may, perhaps, rest on the ground that the principal is responsible for the reasonable and natural consequences of acts which he had commanded. In a later case it was held that the owner of a quarry was liable for a nuisance consisting in obstructing a public river by casting into it stone and rubbish, although the acts were committed by his workmen without his knowledge and against his general orders, and, by reason of his age, he was unable to exercise supervision. The departure from the general rule was explained on the ground that the proceeding, although in form criminal, was in its nature civil.[5]

Statutory Offenses

As we have seen, many statutes impose punishment irrespective of any intent to violate them, and notwithstanding ignorance or mistake of fact which at common law would be an excuse.[6] There are statutes, most of them having for their object the regulation of the sale of intoxicating liquors, which prohibit the doing of certain acts by certain classes of persons or in certain places, and which either ex-

[4] Rex v. Medley, 6 Car. & P. 292. In Rex v. Dixon, 3 Maule & S. 11, a conviction for selling unwholesome bread on proof that the foreman by mistake had put too much alum in it was sustained on the ground that, if a person employs a servant to use an ingredient the unrestricted use of which is noxious, and does not restrain him in its use the employer is liable, if it be used in excess, for failure to apply proper caution against its misuse.

[5] Reg. v. Stephens, L. R. 1 Q. B. 702. [6] Ante, p. 90.

pressly or by implication provide that such persons or the proprietors of such places shall be responsible for such acts, although committed without their knowledge, or even contrary to their instructions, by their subordinates. Such are many statutes prohibiting the sale of intoxicating liquors without a license, or in violation of the conditions of the license, or prohibiting sales to minors or intoxicated persons, or prohibiting saloons to be kept open on Sunday or after a certain hour, or forbidding the windows of saloons to be curtained. Doubtless it requires a clear expression of intention on the part of the Legislature to justify a construction of a statute as imposing punishment upon a person for an act done without his knowledge or contrary to his instructions, and, unless such intention appear, the ordinary rule that a man is not criminally responsible for acts which he has not authorized must prevail;[7] but, where the statute does so provide, it is valid.[8] There is much conflict, real or apparent, in the decisions, and different constructions have often been placed by different courts upon similar enactments. The question for determination in each case must be whether it was the intention to require persons of the designated class to see to it at their peril that the prohibited acts are not performed. Thus, under a statute requiring saloons to be closed on Sunday, and imposing punishment for violation of the requirement, it was held that the penalties

[7] Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Com. v. Wachendorf, 141 Mass. 270, 4 N. E. 817.

[8] People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; People v. Blake, 52 Mich. 566, 18 N. W. 360; Noecker v. People, 91 Ill. 494; State v. Denoon, 31 W. Va. 122, 5 S. E. 315; George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376; Com. v. Kelley, 140 Mass. 441, 5 N. E. 834; Boatright v. State, 77 Ga. 717; Carroll v. State, 63 Md. 551, 3 Atl. 29; Mogler v. State, 47 Ark. 109, 14 S. W. 473; State v. Kittelle, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698 (sale to minor).

of the statute were denounced against the person whose saloon is not kept closed, and that no other fact than that it was not kept closed was necessary to complete the offense. "The section," said Cooley, C. J., "makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon closed." [9] So, under a statute providing that no licensee of a saloon shall place or maintain, or permit to be placed or maintained, on the premises, any screen or curtain or other obstruction, it was held that a licensee was liable for a screen or curtain which a servant maintained in his absence and against his orders, on the ground that the statute by fair intendment made the licensee responsible for the condition of his premises, and liable whether the prohibited act was done by him personally or by his agent left in charge of the business.[10] On the other hand, where a saloon keeper was prosecuted under another section of the same statute, which provided that "no person shall sell or expose or keep for sale spirituous or intoxicating liquors except as authorized in this chapter," it was held that the defendant was not liable for a sale made without his knowledge between prohibited hours, it appearing that he had given strict orders that no such sale should be made, upon the ground that the section on which the complaint was based subjected to punishment "any person who sells liquor," and that it was unreasonable to construe it as subjecting to punishment a person who does not sell, because a servant in his employ, in opposition to his will and against his orders, makes an unlawful sale.[11]

[9] People v. Roby, supra. Cf. People v. Parks, 49 Mich. 333, 13 N. W. 618, and People v. Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385, where the statutes involved were differently construed.

[10] Com. v. Kelley, supra.

[11] Com. v. Wachendorf, 141 Mass. 270, 4 N. E. 817.

AGENT'S LIABILITY FOR HIS OWN ACTS

53. An agent, if of sufficient mental capacity, is criminally liable for his acts, though they are committed by command of his principal, and in the course of his principal's business.[12]

A servant or other agent, if he has the requisite knowledge and intent to render him liable for his acts, can never defend, when prosecuted for a criminal act, on the ground that he was commanded by his master to do the act, or that the act was in the course of his master's business. As we have already seen, no command will excuse an act,[13] except, in some cases, the command of a husband to his wife.[14] Thus, a barkeeper illegally selling liquor is equally liable with his employer.[15] Even a voluntary agent who makes an unlawful sale of liquor, or assists in maintaining a liquor

[12] 1 Bl. Comm. 429, 430; 2 Dane, Abr. 316. Liable for nuisance, State v. Bell, 5 Port. (Ala.) 365; Allyn v. State, 21 Neb. 593, 33 N. W. 212. Keeping eating house without license, Winter v. State, 30 Ala. 22. Keeping house as liquor nuisance, liable where he has charge of business, Com. v. Merriam, 148 Mass. 425, 19 N. E. 405; Com. v. Kimball, 105 Mass. 465; but not where master is sole proprietor, and directly superintends the business, Com. v. Galligan, 144 Mass. 171, 10 N. E. 788, and cases there cited; State v. Gravelin, 16 R. I. 407, 16 Atl. 914 (cf. State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838). Keeping gaming house, Stevens v. People, 67 Ill. 587; Com. v. Drew, 3 Cush. (Mass.) 279.

[13] Ante, p. 101.

[14] Ante, p. 102.

[15] Com. v. Hadley, 11 Metc. (Mass.) 66; Com. v. Hoyer, 125 Mass. 209; Com. v. Brady, 147 Mass. 583, 18 N. E. 568; State v. Wiggin, 20 N. H. 449; Schmidt v. State, 14 Mo. 137; Hays v. State, 13 Mo. 246; State v. Matthis, 1 Hill (S. C.) 37; State v. Wadsworth, 30 Conn. 55; French v. People, 3 Parker, Cr. R. (N. Y.) 114; Menken v. City of Atlanta, 78 Ga. 668, 2 S. E. 559; Davidson v. State, 27 Tex. App. 262, 11 S. W. 371; State v. Chastain, 19 Or. 176, 23 Pac.

nuisance, and who receives no compensation for his work, is guilty.[16] If, however, a servant does not in fact know he is doing wrong, and is not charged by law with knowledge, as, for instance, where he takes another's property for his master, which he believes to be his, but which the master intends to steal, not having the particular intent necessary to constitute the crime, the servant is not criminally liable.[17]

963; Baird v. State, 52 Ark. 326, 12 S. W. 566; State v. Morton, 42 Mo. App. 64; Abel v. State, 90 Ala. 631, 8 South. 760.

[16] State v. Finan, 10 Iowa, 19; Com. v. Williams, 4 Allen (Mass.) 587; State v. Bugbee, 22 Vt. 32; Cagle v. State, 87 Ala. 38, 93, 6 South. 300; State v. Herselus, 86 Iowa, 214, 53 N. W. 105; Beck v. State, 69 Miss. 217, 13 South. 835.

[17] Reg. v. Bleasdale, 2 Car. & K. 765; State v. Matthews, 20 Mo. 55.

CHAPTER VII

THE OVERT ACT—ATTEMPTS, SOLICITATIONS, AND CONSPIRACY

54. Necessity for Overt Act.
55–56. Attempts.
57. Solicitation.
58–60. Conspiracy.

NECESSITY FOR OVERT ACT

54. The law does not punish mere intention, but requires some overt act in an attempt to carry the intention into execution.

EXCEPTION—There is an exception to this rule in the case of conspiracy, unless the conspiring may be regarded as an overt act.

ATTEMPTS

55. An attempt to commit a crime is an act done with intent to commit that crime, and tending to, but falling short of, its commission.

(a) The act must be such as would be proximately connected with the completed crime.

(b) There must be an apparent possibility to commit the crime in the manner proposed.

(c) There must be a specific intent to commit the particular crime at the time of the act.

(d) The attempt must be unsuccessful.

(e) Voluntary abandonment of purpose after an act constituting an attempt is no defense.

(f) Consent to the attempt will be a defense if it would be a defense in case the crime were completed, but not otherwise.

56. All attempts to commit a crime, whether the crime be a felony or a misdemeanor, and whether it be such at common law or by statute, are misdemeanors at common law.[1]

EXCEPTIONS—(a) In some states, attempts are entirely regulated by statute.

(b) In most states, some attempts are felonies by statute.

(c) Attempts to commit certain classes of statutory misdemeanors are not indictable.

The law does not punish a mere intent to commit a crime, unaccompanied by any overt act. Thus, merely being in possession of dies with intent to make counterfeit coin is not a crime at common law,[2] nor is the having of possession of forged instruments with intent to pass or utter them.[3] The law does, however, punish the combination of intent and act, though they may not amount to the actual commission of the crime intended. Thus, when dies are procured with intent to counterfeit,[4] or indecent prints are procured with intent to publish them,[5] an indictable offense is committed, the procuring being an overt act.

There is a marked distinction between "attempt" and "in-

[1] Rex v. Roderick, 7 Car. & P. 795; Com. v. Barlow, 4 Mass. 439; Com. v. Kingsbury, 5 Mass. 106; Randolph v. Com., 6 Serg. & R. (Pa.) 398; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; State v. Jordan, 75 N. C. 27.

[2] Rex v. Heath, Russ. & Ry. 184; Rex v. Stewart, Id. 287. But see Rex v. Sutton, cas. temp. Hardw. 370.

[3] Com. v. Morse, 2 Mass. 138. This has been to some extent changed by statute. State v. Vincent, 91 Mo. 662, 4 S. W. 430; State v. Allen, 116 Mo. 548, 22 S. W. 792.

[4] Reg. v. Roberts, 7 Cox, Cr. Cas. 39; Rex v. Fuller, Russ. & Ry. 308; Dugdale v. Reg., 1 El. & Bl. 435.

[5] Dugdale v. Reg., 1 El. & Bl. 435; Reg. v. Dugdale, 1 Dears. Cr. Cas. 64; Reg. v. Fulton, Jebb, Cr. Cas. 48. And see Reg. v. McPherson, Dears. & B. Cr. Cas. 201.

tent." The former conveys the idea of physical effort to accomplish an act; the latter, the state of mind with which an act is done or contemplated.[6] It would be difficult to give a definition of "attempt" which would clearly draw the line between those acts done with intent to commit a crime and tending towards, but falling short of its commission, which the criminal law notices, and those acts done with like intent which it deems too trivial, or not sufficiently proximate to the result intended, to notice.[7] To constitute an attempt there must be an act done in pursuance of the intent, and more or less directly tending to the commission of the crime. In general, the act must be inexplicable as a lawful act, and must be more than mere preparation. When this combination of intent and overt act falling short of the intended crime concurs, the substantive crime of attempt is committed.

Whether the act done goes beyond preparation to commit the crime, and amounts to an attempt to commit it, is a question of degree. If the act done comes very near to the accomplishment of the intended crime, the intent to complete it renders the crime so probable that public policy requires that it be punished, though there is still a locus pœnitentiæ, in that there is necessary a further act requiring a further exertion of the will to complete the crime.[8]

Buying a gun for the purpose of killing another is a mere preparation, and is not an attempt to murder, but it would be different if the gun were pointed and the trigger pressed, and probably even if it were merely pointed with intent to shoot and kill, though even this is doubtful.[9] Delivering

[6] State v. Martin, 14 N. C. 329; Lewis v. State, 35 Ala. 388.

[7] See Bish. New Cr. Law, § 728; Steph. Dig. Cr. Law, art. 49.

[8] See opinion of Holmes, J., in Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55. See, also, Com. v. Kennedy, 170 Mass. 18, 22, 48 N. E. 770.

[9] Proceeding to point a loaded gun, and exclaiming, "You are a

poison to one and soliciting him to put it into another's well is not an attempt to administer poison to the owner of the well;[10] nor is the procurement by a prisoner of tools adapted to jail breaking an attempt to break jail.[11]

If one walks toward a house intending to commit burglary, this is not an attempt;[12] but if he tries to open the door, and is unable to do so, it is otherwise, and it has even been held that when, armed with burglars' tools, he goes up the steps of the house, the crime is committed.[13] It is said that the act must be such as would be proximately connected with the crime if it were completed. Purchase of matches with intent to burn a straw stack is not an attempt, but it is otherwise if a fire is started, and after-

dead man," was held not an attempt. Reg. v. Lewis, 9 Car. & P. 523. Putting finger on trigger of pistol at halfcock held not an attempt. Reg. v. St. George, Id. 483. In Florida, it seems to have been held that pointing a gun at a person is not an attempt to kill. Davis v. State, 25 Fla. 272, 5 South. 803. Putting broken glass into food, with intent that the food should be eaten by another, and thus that other be killed, is not an attempt to kill, without proof that the intended victim ate the food, or that defendant did some further act toward administering it to him. Leary v. State, 13 Ga. App. 626, 79 S. E. 584.

[10] Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653.

[11] STATE v. HURLEY, 79 Vt. 28, 64 Atl. 78, 6 L. R. A. (N. S.) 804, 118 Am. St. Rep. 934, Mikell Illus. Cas. Criminal Law, 84.

[12] 1 Whart. Cr. Law, § 181; dictum in Reg. v. Roberts, Dears. Cr. Cas. 539, and in Reg. v. Meredith, 8 Car. & P. 589. One cannot be convicted of attempt to enter and break a dwelling merely because he agrees with another to do so, meets him at the appointed time at a saloon with a revolver and slippers, to be used in the house, and goes into a drug store and buys chloroform to use, being arrested when he comes out. People v. Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108. The statute that any person who shall attempt to commit an offense, and do any act towards its commission, but shall fail or be prevented, is declaratory of the common law. People v. Youngs, supra; People v. Webb, 127 Mich. 29, 86 N. W. 406. Cf. Com. v. Peaslee, supra.

[13] Com. v. Clark, 10 Pa. Co. Ct. Rep. 444.

wards blown out by the wind. Taking an impression of a particular lock, and having a key made, with intent to commit burglary, has been held a sufficient act to constitute an attempt;[14] but sending an order to a firm in San Francisco to ship whisky to a point in Alaska was held to be mere preparation, and not an attempt to introduce whisky into Alaska.[15] So, also, in case of preparation for an unlawful marriage it was held that there was not a sufficient overt act in sending for a magistrate to perform it, and eloping; the court saying the attempt would not be complete until the parties stood before the magistrate.[16] Where a person set aside some of his master's property with intent to steal it, he was held guilty of an attempt to steal, though the fraud was discovered before he had time to remove it.[17]

Inability to Commit the Crime—Absence of Essential Object or Inadequacy of Means

A man may fail to commit the crime intended solely because the nonexistence of some essential object, or because the inadequacy of the means used, renders the crime impos-

[14] Griffin v. State, 26 Ga. 493.

[15] U. S. v. Stephens (C. C.) 8 Sawy. 116, 12 Fed. 52. Starting to hunt prairie chickens with loaded gun is not an attempt to kill prairie chickens. Cornwell v. Association, 6 N. D. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. Rep. 601.

[16] People v. Murray, 14 Cal. 159. But see Reg. v. Chapman, 2 Car. & K. 846, where taking a false oath to procure a marriage license was held an attempt to marry without a license.

[17] Cheeseman's Case, Leigh & C. 140. Where a contractor, by false pretenses as to the amount of property delivered under the contract, obtained credit for the excess, and would have been paid therefor but for discovery of the fraud, he was held guilty of an attempt to obtain property by false pretenses. Reg. v. Eagleton, Dears. Cr. Cas. 515. See Groves v. State, 116 Ga. 516, 42 S. E. 755, 59 L. R. A. 598, for a good discussion of the difference between the acts which constitute an attempt to commit a crime and those which constitute preparation merely.

sible of completion; under such circumstances he may in some cases be guilty of a criminal attempt, while in others he may not. The books are not clear as to the line between these cases. Though the contrary was formerly held in England,[18] it has been held in several of our states that an attempt to pick a pocket, or steal from the person or a money drawer, is a criminal attempt, though there may be nothing in the pocket, or on the person, or in the drawer,[19] and a later English case is to the same effect.[20] It has also been held a criminal attempt to kill where a man shot at a hole in the roof where he supposed a policeman was watching, though, when the shot was fired, the policeman had the good fortune to be at another point on the roof;[21] and even in England a conviction for an attempt to commit an abortion was sustained though the woman was not pregnant.[22] This is not

[18] Reg. v. Collins, 9 Cox, Cr. Cas. 497.

[19] State v. Wilson, 30 Conn. 500; Com. v. McDonald, 5 Cush. (Mass.) 365; People v. Jones, 46 Mich. 441, 9 N. W. 486; Clark v. State, 86 Tenn. 511, 8 S. W. 145; Rogers v. Com., 5 Serg. & R. (Pa.) 463; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Beal, 37 Ohio St. 108, 41 Am. Rep. 490; People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732 (under Pen. Code, § 34, providing that an act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit the crime).

[20] Reg. v. Ring, 61 Law J. M. Cas. 116, 66 Law T. (N. S.) 300, following Reg. v. Brown, 24 Q. B. Div. 357, and overruling Reg. v. Collins, 9 Cox. Cr. Cas. 497; Com. v. Cline, 213 Mass. 225, 100 N. E. 358.

[21] People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165. One who shoots through a window at a bed upon which he supposed the prosecutor to be lying, the prosecutor in fact being in a different part of the house, is guilty of an attempt to commit murder. State v. Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. St. Rep. 763.

[22] Reg. v. Goodchild, 2 Car. & K. 293, 2 Cox, Cr. Cas. 40. See, also, Com. v. Taylor, 132 Mass. 261; Com. v. Tibbetts, 157 Mass.

altogether consistent with their refusal to convict for attempting to pick an empty pocket. In all of these cases it was absolutely impossible to commit the intended crime, but the accused did not know of the existence of the facts rendering it impossible. There was to him an apparent possibility, and most of the courts hold that this is sufficient. In a Connecticut case it was said, in speaking of an attempt to pick an empty pocket, that "the perpetration of the crime was legally possible, the persons in a situation to do it, the intent clear, and the act adapted to the successful perpetration of it; and whether there was or not property in the pocket was an extrinsic fact, not essential to constitute the attempt." [23] It was said in a Massachusetts case that, "whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." [24]

Again, one may fail to accomplish his purpose because the means adopted are insufficient. He may fail in an intended murder because his gun is unloaded, or because his victim is too far off for the ball to reach him, or he may fail in an attempt to poison because what he supposes to be poison is in fact a harmless drug. Here the same principle has been applied. The great weight of authority is that if

519, 82 N. E. 910. In Iowa it has been held a criminal attempt to commit abortion to administer a harmless drug, not knowing it to be harmless, with intent to procure an abortion. State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148.

[23] State v. Wilson, 30 Conn. 500.

[24] Com. v. Jacobs, 9 Allen, 274.

the means are, to the defendant, apparently adapted to accomplish the intended result, there is a criminal attempt,[25] though the contrary has also been held, and there are cases which require the means to be really adapted.[26] Of course, if the means are not only absolutely, but apparently, inadequate, it is different. To strike a man with a slight switch, or snap a toy gun at him, could not amount to an attempt to kill him, because in such cases there could not be the required intent to kill. It is said by Mr. Bishop that "where the nonconsummation of the intended criminal result is caused by an obstruction in the way, or by the want of the thing to be operated upon, if such impediment is of a nature to be unknown to the offender, who used what seemed ap-

[25] Kunkle v. State, 32 Ind. 230. On charge of assault with intent to kill, where the gun was pointed, and the trigger pulled, it is no defense that the gun failed to go off, People v. Ryan, 55 Hun, 214, 8 N. Y. Supp. 241; or that there was no cap on it, Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691. Administering harmless drug with intent to kill, believing the substance to be poison, held an attempt to kill. State v. Glover, 27 S. C. 602, 4 S. E. 564. Putting poison in cup with intent to kill, though dose insufficient. Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770. Evidence that ergot was administered, and that it will, under some circumstances, produce an abortion, sustains conviction of attempt to commit abortion. Hunter v. State, 38 Tex. Cr. R. 61, 41 S. W. 602. See, also, post, p. 265, and cases cited.

[26] Firing at another with a gun not loaded, so as to hurt, not an attempt. Henry v. State, 18 Ohio, 32; State v. Swails, 8 Ind. 524, 65 Am. Dec. 772 (since overruled by Kunkle v. State, 32 Ind. 220). Attempt to cheat by forged draft, where the person to be cheated was not in existence, held not a criminal attempt. People v. Peabody, 25 Wend. (N. Y.) 472. It seems to have been held in Florida that pointing a gun at another is not an attempt to kill, in the absence of proof that it was loaded. Davis v. State, 25 Fla. 272, 5 South. 803. See, also, on this point, Reg. v. Gamble, 10 Cox, Cr. Cas. 545; Tarver v. State, 43 Ala. 354; Allen v. State, 28 Ga. 395, 73 Am. Dec. 760; State v. Napper, 6 Nev. 113; Robinson v. State, 31 Tex. 170.

propriate means, the punishable attempt is committed."[27] The statutes, in some states defining particular attempts, require that there shall be a present ability to accomplish the crime intended, and in such case, of course, actual ability to commit the crime is essential.

It has been said that to shoot at a log or a shadow, believing it to be a man, would not be an attempt to murder,[28] and that if an assault should be made on a man, or on a dummy dressed as a woman, with intent to ravish, the assailant believing that the man or dummy is a woman, there would be no attempt to rape.[29] The reason given in the case last cited was that in such a case, as the commission of the intended crime as intended and attempted would be an impossibility, no step taken to perpetrate the act would amount to an attempt.

Same—Inability in Law to Commit the Crime

If a person attempts to do something which, even if his purpose is accomplished, will not be a crime in law, he is not guilty of a criminal attempt, though he may think that he will commit a crime. In New York, where the Code declares it extortion to obtain the property of another with his consent induced by a wrongful use of force or fear, it has been held that to attempt to obtain another's property by threats is not a criminal attempt where the person threatened is not influenced by the threats, but voluntarily gives up the property for the purpose of prosecuting the offender.[30] The ground of the decision was that, under the circumstances, it was legally impossible to commit the crime of extortion, because of the absence of force or fear. So it

[27] 1 Bish. New Cr. Law, § 752.
[28] Dictum in Reg. v. McPherson, Dears. & B. Cr. Cas. 201.
[29] Dictum in People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072.
[30] People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072.

has been held that there could be no conviction for an attempt to obtain by false pretense a school warrant from a board of school directors, if the directors had no legal authority to issue a valid warrant.[31] And on the same principle it has been held that there could be no conviction of an attempt to bribe an officer to vote to award a contract, if the officer had no legal right to vote on the question.[32]

On the same principle there can be no conviction for an attempt to impose a liability on a county, when the acts relied on to prove the attempt could not in law impose any liability.[33] It has also been held that there can be no attempt to commit a crime by one who is in law incapable of committing it. A boy, if under the age of fourteen, is in some jurisdictions held incapable in law of committing rape,[34] and therefore cannot be guilty of an attempt to commit rape,[35] but it has been held, if he is over that age, and

[31] State v. Lawrence, 178 Mo. 350, 77 S. W. 497. Compare People v. Howard, 135 Cal. 266, 67 Pac. 148.

[32] State v. Butler, 178 Mo. 272, 77 S. W. 560. Where an American, mistaking a party of American soldiers for British troops, went over to them, intending to adhere to them, this was held not to be a crime, as, under the circumstances, no crime could be committed. Respublica v. Malin, 1 Dall. (Pa.) 33, 1 L. Ed. 25. Attempt to commit subornation of perjury is not proved unless it appears that there was an attempt to procure false testimony in a matter material to the issue in some particular judicial proceeding. Nicholson v. State, 97 Ga. 672, 25 S. E. 360.

[33] Marley v. State, 58 N. J. Law, 207, 33 Atl. 208. In this case the court said: "An intent to commit a crime is not equivalent to an attempt to commit it, for the purpose must be accompanied with some substantive act, or series of acts, tending towards its accomplishment. * * * These defendants, even if the intent to commit the offense can be imputed to them, did, in legal contemplation, no act towards the accomplishment of such purpose for every act they did was, in the eye of the law, an absolute nullity. Not one of them therefore, could tend to carry into effect any criminal project."

[34] Post, p. 251.

[35] 1 Whart. Cr. Law, § 184; Reg. v. Phillips, 8 Car. & P. 736; People v. Randolph, 2 Parker, Cr. R. (N. Y.) 213; Williams v. State,

apparently capable of the crime, he may be convicted of an attempt, though he fails because of physical incapacity.[36]

The Intent

The act must be done with the specific intent to commit the particular crime the accused is charged with attempting to commit. This specific intent at the time the act is done is essential. To do an act from general malevolence is not an attempt to commit a crime, because there is no specific intent, though the act, according to its consequences, may amount to a substantive crime. To do an act with intent to commit one crime cannot be an attempt to commit another crime, though it might result in such other crime. To set fire to a house, and burn to death a human being who is in it, but not to the offender's knowledge, would be murder, though the intent was to burn the house only; but to attempt to set fire to the house under such circumstances would be an attempt to commit arson only, and not an attempt to murder. A man actuated by general malevolence may commit a murder, though there is no actual intention to kill; but, to be guilty of an attempt to murder, there must be a specific intent to kill.[37] To cause death by throw-

14 Ohio, 222, 45 Am. Dec. 536; State v. Handy, 4 Har. (Del.) 566. But see, contra, Com. v. Green, 2 Pick. (Mass.) 380.

[36] Impotency no defense unless defendant knew he was impotent. Territory v. Keyes, 5 Dak. 244, 38 N. W. 440.

[37] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Slatterly v. People, 58 N. Y. 354; SIMPSON v. STATE, 59 Ala. 1, 31 Am. Rep. 1, Mikell Illus. Cas. Criminal Law, 90; State v. Stewart, 29 Mo. 419; Scott v. State, 49 Ark. 156, 4 S. W. 750; State v. Evans, 39 La. Ann. 912, 3 South. 63; Moore v. State, 26 Tex. App. 322, 9 S. W. 610; Carter v. State, 28 Tex. App. 355, 13 S. W. 147; Patterson v. State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152; People v. Mize, 80 Cal. 41, 22 Pac. 80; Walls v. State, 90 Ala. 618, 8 South. 680. The intent, however, may be inferred from the circumstances. Crosby v. People, 137 Ill. 325, 27 N. E. 49. Jackson v. State, 94 Ala. 85, 10 South. 509.

ing down a heavy beam into a crowded street would be murder, though there was no intent to kill; but if a person were only wounded by the beam, the person throwing it would not be guilty of an attempt to kill. To constitute the crime of rape, it is essential that the act shall be accomplished by force against the woman's will, and therefore, to constitute an attempt to rape, it is essential that there shall be an intent to use force, if necessary.[88] The intent to commit a crime must exist at the time the overt act is done. An intention formed subsequent to the act is not sufficient. As we have seen, it is an attempt to counterfeit for one to procure dies with intent to use them for counterfeiting; but, if one procures dies innocently, he will not be punished for an intent to counterfeit afterwards entertained, because there is no criminal intent when the overt act is committed, and there is no overt act when the intent is formed.[89] It is scarcely necessary to say that, since an intent is necessary to constitute an attempt, there can be no attempt at negli-

To shoot at one person with intent to kill him is an attempt to kill another person who is struck by the ball. State v. Montgomery, 91 Mo. 52, 3 S. W. 379.

[88] Lewis v. State, 35 Ala. 380; State v. Brooks, 76 N. C. 1; Johnson v. State, 63 Ga. 355; Taylor v. State, 50 Ga. 79; Johnson v. State, 63 Ga. 355; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; State v. Kendall, 73 Iowa, 255, 34 N. W. 843, 5 Am. St. Rep. 679; People v. Kirwan, 67 Hun, 652, 22 N. Y. Supp. 160; People v. Quin, 50 Barb. (N. Y.) 128; Peterson v. State, 14 Tex. App. 162; Brown v. State, 27 Tex. App. 330, 11 S. W. 412; Langan v. State, 27 Tex. App. 498, 11 S. W. 521; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Jones v. State, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850; Moore v. State, 79 Wis. 546, 48 N. W. 653; State v. Owsley, 102 Mo. 678, 15 S. W. 137; People v. Brown, 47 Cal. 447; People v. Fleming, 94 Cal. 308, 29 Pac. 647. There can be no attempt to rape by using cantharides, as that drug cannot have the effect of overcoming the woman's power of resistance. State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505. See, also, post, p. 260.

[89] Ante, p. 60.

gence, because a negligent act is necessarily done without intention.

Abandonment of Purpose

When an act which amounts to an attempt has been once committed, it seems that no abandonment, even though voluntary, will relieve it of its criminality. Of course, if a person gives up his evil purpose before doing an act sufficient to constitute an attempt, he is not guilty, for there has been no attempt;[40] but, if he has committed a sufficient act, he has committed the crime of attempt, and he cannot purge himself by abandoning it.[41] To say otherwise would be to allow one to escape punishment by repenting after the crime has been committed.

Effect of Consent

We have already, in discussing the nature of crime, stated what effect consent of the person against whom a wrongful act is committed has in preventing the act from being a crime.[42] The question comes up in a new light in connection with attempts, and it will be well to consider it more particularly in that connection. We shall presently see that some crimes must, from their nature, be committed without consent, such, for instance, as larceny, robbery, and rape; and we have seen that a person may consent to an assault and battery which does not maim him or constitute a breach of the peace. In these cases, consent to the act prior to an attempt to commit it will prevent the attempt from being a

[40] Pinkard v. State, 30 Ga. 757.

[41] Lewis v. State, 35 Ala. 380; State v. Elick, 52 N. C. 68; State v. McDaniel, 60 N. C. 245; Glover v. Com., 86 Va. 382, 10 S. E. 420; People v. Stewart, 97 Cal. 238, 32 Pac. 8; Young v. State, 82 Ga. 752, 9 S. E. 1108; Bishop v. State, 86 Ga. 329, 12 S. E. 641.

[42] Ante, pp. 10, 12.

crime.[43] If, however, an attempt to commit a crime is made without consent, subsequent consent to the completed act will not, as a rule, make the attempt any the less a crime. Thus, in case of attempt to rape, an indictment will lie for the attempt where it was at first resisted, though the woman afterwards ceased to resist, and consented to the act.[44] Consent, however, cannot be a defense on indictment for an attempt if it would not be a defense in case the intended crime were accomplished. Carnal knowledge of a female under the age of consent is rape, notwithstanding her consent, and so an attempt to have carnal knowledge of her with her consent is an attempt to rape.[45]

[43] People v. Gardiner, 73 Hun, 66, 25 N. Y. Supp. 1072. Where the defendant plotted to obtain certain indictments by bribery and to destroy them, and the district attorney, to apprehend him in the commission of the crime, instructed his employés to accept the defendant's proposition and to deliver the indictments in return for a consideration, it was held that the defendant might be convicted of an attempt to obtain documents from an official unlawfully and to commit grand larceny. People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131.

[44] State v. Hartigan, 32 Vt. 607; State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Bagan, 41 Minn. 285, 43 N. W. 5; Dickey v. McDonnell, 41 Ill. 62.

[45] State v. Harney, 101 Mo. 470, 14 S. W. 657; Davis v. State, 31 Neb. 247, 47 N. W. 854. Contra, Whitcher v. State, 2 Wash. 286, 26 Pac. 268.

SOLICITATION

57. (1) It is a crime at common law to solicit another to commit a felony although the person solicited refuses to commit it.

(2) Courts are not agreed as to whether it is a crime to solicit another to commit a misdemeanor. By the better view it is, if the misdemeanor is of a serious nature.

(3) If the crime solicited is committed, the offense of solicitation is merged in the greater offense.

It is an indictable offense at common law to solicit another to commit a felony.[46] Thus it has been held that it is a misdemeanor to solicit another to commit murder[47] or arson[48] or sodomy,[49] or larceny,[50] or adultery.[51] Whether solicitation to commit a misdemeanor is a crime is a question upon which there is some conflict. Thus it has been held a crime to solicit a public officer to take a bribe,[52] and

[46] Com. v. Flagg, 135 Mass. 545; Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782; State v. Davis, Tapp. (Ohio) 171. But see Whart. Cr. Law, § 179.

[47] Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782; Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653; Reg. v. Williams, 1 Car. & K. 589; Damarest v. Haring, 6 Cow. (N. Y.) 76, at page 88.

[48] Com. v. Flagg, supra; People v. Bush, 4 Hill (N. Y.) 133; State v. Bowers, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199, 28 Am. St. Rep. 847. But see, contra, McDade v. People, 29 Mich. 50. The statute has been amended in Michigan so as to make solicitation a crime. How. Ann. St. 1882, § 9128.

[49] Rex v. Hickman, 1 Moody, 34; Reg. v. Rowed, 6 Jur. 396.

[50] Rex v. Higgins, 2 East, 5; Reg. v. Daniel, 6 Mod. 99; Reg. v. Quail, 4 Fost. & F. 1076; Pennsylvania v. McGill, Add. (Pa.) 21.

[51] State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[52] Rex v. Vaughan, 4 Burrows, 2494; U. S. v. WORRALL, 2 Dall. 384, Fed. Cas. No. 16,766, Mikell Illus. Cas. Criminal Law, 12.

for such a person to solicit a bribe,[53] to solicit a witness to be absent from a prosecution,[54] or to commit embracery.[55] On the other hand, it has been held not to be a crime to solicit another to commit adultery where adultery was a misdemeanor.[56] The better rule appears to be that it is an offense to solicit another to commit a felony or any serious offense, though it may be technically only a misdemeanor.[57] Solicitation to commit a crime is made a crime by statute in most states. Mr. Bishop classes solicitation as an attempt, regarding it as an overt act done towards the commission of the crime solicited, and there is some authority to this effect.[58] But it is generally held that the mere solicitation is not such an overt act as is essential to an attempt,[59] and that, if an indictment lies, it must charge the offense as solicitation.[60]

[53] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569.

[54] State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

[55] State v. Bonds, 2 Nev. 265.

[56] Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686. Explained on the ground that adultery was a mere misdemeanor in Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782. Mere oral solicitation to sexual intercourse which would be incest is not indictable as solicitation at common law, for that punishes only solicitation to such crimes as break the peace or obstruct the course of justice; nor as an attempt, for want of an act. Cox v. People, 82 Ill. 191.

[57] Com. v. Flagg, supra.

[58] 1 Bish. New Cr. Law, § 767 et seq.; People v. Bush, 4 Hill (N. Y.) 133. And see State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

[59] State v. Harney, 101 Mo. 470, 14 S. W. 657; Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; State v. Butler, 8 Wash. 194, 35 Pac. 1093, 25 L. R. A. 434, 40 Am. St. Rep. 900.

[60] State v. Bowers, supra; State v. Butler, supra; Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653, as explained in Com. v. Randolph, supra. Cf. Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55.

CONSPIRACY

58. Conspiracy is a combination of two or more persons to do an unlawful act, whether that act be the final object of the combination, or only a means to the final end, and whether that act be a crime, or an act hurtful to the public, a class of persons, or an individual.[61] The offense is usually divided into three heads:

(a) Where the end to be attained is in itself a crime.

(b) Where the object is lawful, but the means by which it is to be attained are unlawful.

(c) Where the object is to do an injury to a third person, or a class, though, if the wrong were inflicted by a single individual, it would be a civil wrong, and not a crime.

59. The gist of the crime being the unlawful combination, no further overt act is necessary.

60. Conspiracies are misdemeanors, unless made felonies by statute.

[61] Har. Cr. Law, 128; Reg. v. Parnell, 14 Cox, Cr. Cas. 508; State v. Mayberry, 48 Me. 218; STATE v. BUCHANAN, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell Illus. Cas. Criminal Law, 95 (containing an exhaustive review of the subject and the cases). See, also, Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346. In the noted Chicago Anarchist Case, it was held that an organization to propagate theories involving destruction of the present social system, and the common division of property and capital, is a criminal conspiracy if it advocates attainment of its ends by violent means, or if, in violation of the militia laws of the state, it provides for forming and drilling armed bodies of men for the purpose of carrying its plans into effect. Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

It is essential to constitute the crime of conspiracy that there shall be an agreement to commit the unlawful acts; but it is not necessary that the agreement shall be a formal one. It is sufficient if the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement to do the act, though the agreement is not manifested by any formal words.[62] There must, however, be some understanding between the parties; mere intention, or mere cognizance of another's intention to commit a crime, cannot make one his co-conspirator.[63] The gist of the crime being the combination, it follows that it cannot be committed by less than two persons;[64] and, as husband and wife are in law regarded as one person, it cannot be committed by them without the joinder of a third person.[65] As soon as the unlawful combination or agreement is entered into, the crime of conspiracy is complete, and it is not necessary that there be any overt act in an attempt to carry out the agreement, the conspiring being regarded by some courts as an overt act sufficient to require the law's notice.[66]

[62] McKee v. State, 111 Ind. 378, 12 N. E. 510; Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96. A conspiracy to defraud by false pretenses is complete when formed, and it is immaterial that the person to be defrauded was not deceived, or that the pretenses were not calculated to deceive a person of ordinary intelligence. People v. Gilman, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218, 80 Am. St. Rep. 490.

[63] U. S. v. Lancaster (C. C.) 44 Fed. 896, 10 L. R. A. 333. And see ante, pp. 60, 113, 120.

[64] Com. v. Manson, 2 Ashm. (Pa.) 31.

[65] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; People v. Miller, 82 Cal. 107, 22 Pac. 934; State v. Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

[66] Rex v. Gill, 2 Barn. & Ald. 204; Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Hazen v. Com., 23 Pa. 355; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; State v. Younger, 12 N. C. 357, 17 Am. Dec. 571; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; People

Under the statutes of some of the states, however, and under some of the federal statutes relating to conspiracies, an overt act is expressly required.

Character of the Acts Contemplated

Where the object of the combination is to commit any crime, or where the object is lawful, but is to be attained by committing a crime, which is virtually the same thing, the conspiracy is always criminal. It will be noticed that, in the second division of the crime, it is stated that it is a criminal conspiracy to combine for the purpose of effecting a lawful object by unlawful means. Where the means to be used amount to a crime, as has just been stated, there is no difficulty in pronouncing the conspiracy criminal. The difficulty arises where the means amount merely to a civil wrong, and this applies equally to the third division of the crime. A combination of persons to commit a wrong, either as an end or as the means to an end, is so much more dangerous, because of the increased power to do the wrong, that the law, in some cases, regards it as criminal, whereas, if the wrong were attempted or even done by a single individual, the act would not be punished as a crime, but the injured person would be left to his civil action for redress. The injury to the public generally would be regarded as too

v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Ochs v. People, 124 Ill. 399, 16 N. E. 662; STATE v. BUCHANAN, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell Illus. Cas. Criminal Law, 95; State v. Noyes, 25 Vt. 415; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; People v. Arnold, 46 Mich. 268, 9 N. W. 406; State v. Pulle, 12 Minn. 164 (Gil. 99); U. S. v. Lancaster (C. C.) 44 Fed. 896, 10 L. R. A. 333. In conspiracy, "the confederation or agreement is itself the offense. The unlawful agreement makes the crime, and it is complete the moment the agreement is entered into. It may be followed by one overt act, or a series; but, as an offense, it is complete without them." State v. Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121. See, also, Geist v. U. S., 26 App. D. C. 594.

trifling to be noticed. Most of the cases of conspiracy which arise are doubtless cases in which the acts contemplated are indictable either at common law, as in case of conspiracies to murder, to rob, or to cheat by false weights and measures, or under statutes, as in case of conspiracies to obtain property by false pretenses; but, according to the great weight of authority, acts need not necessarily be indictable at all, in order that a conspiracy to commit them be criminal. It is sufficient if they are unlawful. There are a few cases which require the acts contemplated to be indictable,[67] but many of them have been overruled, and the great weight of authority is to the contrary. It has frequently been held a crime to conspire to defraud a person out of his property where the fraud amounted neither to a cheat at common law, nor to false pretenses under the statute.[68] It has also been held criminal to conspire to do many other acts not punishable as crimes; as, for instance, to seduce a female where seduction was not a crime;[69] to procure a

[67] Rex v. Turner, 13 East, 228 (to commit civil trespass); Rex v. Pywell, 1 Starkie, 402 (to sell unsound horse with warranty of soundness); Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. v. Prius, 9 Gray (Mass.) 127 (to cheat insurance company by procuring overinsurance); State v. Straw, 42 N. H. 393 (to commit civil trespass).

[68] Reg. v. Warburton, L. R. 1 Cr. Cas. 274; State v. Rowley, 12 Conn. 101; State v. Burnham, 15 N. H. 396; Com. v. Warren, 6 Mass. 74; STATE v. BUCHANAN, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, Mikell Illus. Cas. Criminal Law, 95; State v. Mayberry, 48 Me. 218; dictum in State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649. To cheat one out of his land, People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; State v. Shooter, 8 Rich. (S. C.) 72. To make a person drunk, and cheat him at cards, State v. Younger, 12 N. C. 357, 17 Am. Dec. 571. To obtain property by false pretenses, Orr v. People, 63 Ill. App. 305. To defraud a county by false pretenses, People v. Butler, 111 Mich. 483, 69 N. W. 734.

[69] Rex v. Lord Grey, 9 How. St. Trials, 127; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780; Anderson v. Com., 5 Rand. (Va.) 627, 16

fraudulent and sham marriage;[69] to effect the escape of a female infant for the purpose of marriage, against her father's will;[71] to procure a fraudulent divorce;[72] to induce a woman to prostitute herself;[73] to slander a person, or otherwise injure him in his character or business;[74] to charge a person with being the father of a bastard, in order to extort money;[75] to have a sane person declared insane.[76] A conspiracy to procure others to commit a crime is a crime.[77]

Am. Dec. 776; State v. Savoye, 48 Iowa, 562 (though in Iowa seduction was a crime by statute).

[70] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. And see State v. Savoye, 48 Iowa, 562.

[71] Mifflin v. Com., 5 Watts & S. (Pa.) 461, 40 Am. Dec. 527.

[72] Cole v. People, 84 Ill. 216 (under Illinois statute).

[73] Rex v. Delavel, 3 Burrows, 1432; Reg. v. Mears, 4 Cox, Cr. Cas. 423; Reg. v. Howell, 4 Fost. & F. 160.

[74] State v. Hickling, 41 N. J. Law, 208, 32 Am. Rep. 198; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; Com. v. Tibbetts, 2 Mass. 536. A combination of persons to injure another without just cause,—such as an injury that is not an incidental effect of legitimately promoting their business,—is a conspiracy to inflict malicious injury at common law. State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700. An agreement by a prisoner with his bail to indemnify the latter is a criminal conspiracy, though the bail acted innocently, with no intent to allow the prisonr to escape justice. Rex v. Porter, 26 T. L. R. 200. But an agreement between theatre managers to exclude a critic from their theatres, the object being to protect themselves from articles reflecting on their personal integrity and the religious faith of their patrons, is not a criminal conspiracy. People ex rel. Burnham v. Flynn, 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420.

[75] Reg. v. Best, 2 Ld. Raym. 1167, 1 Salk. 174. And see Johnson v. State, 26 N. J. Law, 313, but in the latter case the completed act would have been a crime, probably, and the conspiracy was indictable by statute. However, see dictum. See, also, People v. Saunders, 25 Mich. 119.

[76] Com. v. Spink, 137 Pa. 255, 20 Atl. 680.

[77] Hazen v. Com., 23 Pa. 355.

Same—Prejudice to Public Generally—Monopolies—Trade Unions

It has also been held criminal to conspire to do acts which will prejudice the public or the government generally; as, for instance, to manufacture a spurious article to sell as genuine;[78] to obtain a monopoly, and raise the price of a commodity, so as to compel consumers to purchase at an exorbitant price;[79] or, under some circumstances, to raise or lower wages. It is difficult to say to what extent it is criminal to combine for the purpose of raising wages. In England, it has been held indictable to make any combination for such a purpose, but it seems that the weight of authority both in England and in this country, and both under statutes and at common law, requires that some unlawful means shall be contemplated or used, such as a breach of contract of employment, or force, or intimidation; that wage earners may lawfully form a union, and agree among themselves not to work for anybody for less than a certain price, though there are cases to the contrary; but that they are criminally liable for conspiracy if they combine to break their contract with an employer, or to prevent other wage

[78] Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54. Combination by carriers to destroy competition, Sayre v. Louisville Union Benev. Ass'n, 1 Duv. (Ky.) 143, 85 Am. Dec. 613. Conspiracy to defraud bank of issue, and thereby depreciate the securities for the circulation held by the public, is indictable. State v. Norton, 23 N. J. Law, 33.

[79] Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, at page 187, 8 Am. Rep. 159. Combination of dealers to prevent competition in sale of coal held a conspiracy, without regard to what was done, and though the object was protection from ruinous rivalry, and no attempt was made to charge excessive prices. People v. Sheldon, 66 Hun, 590, 21 N. Y. Supp. 859; Id., 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690. Combination of sugar refineries to obtain monopoly, People v. North River Sugar Refining Co., 54 Hun, 354, 7 N. Y. Supp. 406, 5 L. R. A. 386. See, also, post, p. 163, footnotes 97–99.

earners from entering his employ by intimidation or other unlawful means.[80] Under a statute making criminal conspiracies to commit acts injurious to trade or commerce, it was held indictable for journeymen workmen to combine for the purpose of compelling master workmen to obey the rules regulating the price of their labor, the court, in the opinion, stating that a mechanic is not bound to work for any particular price, and may say that he will not make articles for less than a certain price, "but he has no right to say that no other mechanic shall make them for less. * * * If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object, are injurious, not only to the individuals particularly oppressed, but to the public at large." [81]

Same—Against Public Justice and Public Peace

It is also criminal to conspire to pervert or prevent public justice; as, for instance, to falsely charge another with a crime, or otherwise procure criminal process against another for oppression or private ends; [82] to fabricate, destroy,

[80] Reg. v. Brown, 12 Cox, Cr. Cas. 316; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649 (notifying employer that unless he discharges certain men they will, in a body, quit work); State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710 (publishing scab list); State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23 (boycott); Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895 (boycott). For a collection and review of the cases, see 28 Am. Dec. 507, and 76 Am. Dec. 783. Railway employés cannot combine to quit work to compel employer to withdraw from contractual relations with third person. U. S. v. Cassidy (D. C.) 67 Fed. 698. Conspiracy to drive mechanic out of employment because he would not join a union. State v. Dyer, 67 Vt. 690, 32 Atl. 814.

[81] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

[82] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Com. v. Tibbetts,

or suppress evidence;[83] to resist or impede a sheriff or other officer in the performance of his legal duties;[84] to pack a jury, or otherwise tamper with jurors.[85] Bona fide combinations, however, to detect and prosecute criminals, are not unlawful. Conspiracies tending to a breach of the public peace are indictable.[86] Thus, it was held criminal to conspire to prevent the introduction of the English language into a church by violent means, though it would not have been unlawful simply to oppose its introduction.[87] It is not a crime, however, for persons who apprehend an immediate, violent, and criminal assault, and who are not themselves in fault, to combine for the purpose of resisting and defending themselves.[88] It would be a crime for a father to combine with others to get possession of his child by the use of violent means, constituting a breach of the peace; but it would be otherwise if the purpose were to get possession peaceably, and without the use of unlawful means.[89]

2 Mass. 536; People v. Saunders, 25 Mich. 119; People v. Dyer, 79 Mich. 480, 44 N. W. 937.

[83] State v. De Witt, 2 Hill (S. C.) 282, 27 Am. Dec. 371; Com. v. Waterman, 122 Mass. 43 (to falsify marriage record); State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450 (to prevent attendance of witness duly summoned). But in Indiana, where all crimes must be defined by statute, conspiracy to commit perjury, to procure acquittal of person charged with crime, was held not to be indictable, State v. McKinstry, 50 Ind. 465.

[84] State v. McNally, 34 Me. 210, 56 Am. Dec. 650; State v. Noyes, 25 Vt. 415.

[85] O'Donnell v. People, 41 Ill. App. 23.

[86] Holtz v. State, 76 Wis. 99, 44 N. W. 1107; Seville v. State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516. See, also, State v. McNally, 34 Me. 210, 56 Am. Dec. 650.

[87] Com. v. Eberle, 3 Serg. & R. (Pa.) 9.

[88] Goins v. State, 46 Ohio, 457, 21 N. E. 476.

[89] Com. v. Myers, 146 Pa. 24, 23 Atl. 164.

Liability of Conspirators

One who conspires with others to commit an unlawful act is criminally liable for all the consequences that naturally flow from it, and is liable for the acts of each and all who participate with him in the execution of the unlawful purpose. Each conspirator is the agent of the other, and the acts done are therefore the acts of each and all.[90] There is no liability, however, for acts not contemplated, and which are not within the purpose of the conspiracy, or the natural consequence of executing that purpose.[91] In discussing the law as to principals and accessaries, we have gone at some length into this question. What was said there is equally applicable here.[92] Conspirators need not all join in the agreement at the same time. Those who join in a conspiracy previously formed, and assist in its execution, become conspirators, and equally liable with the others.[93] A person who has joined in a conspiracy may abandon it, and thereby escape liability for subsequent acts of his co-

[90] 1 Hale, P. C. 441; 1 East, P. C. 257; Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Williams v. State, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133; Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; Miller v. State, 25 Wis. 389; Kirby v. State, 23 Tex. App. 13, 5 S. W. 165; Lusk v. State, 64 Miss. 845, 2 South. 256; Com. v. Smith, 151 Mass. 491, 24 N. E. 677; Baker v. State, 80 Wis. 416, 50 N. W. 518; Turner v. State, 97 Ala. 57, 12 South. 54; U. S. v. Sweeney (C. C.) 95 Fed. 434.

[91] People v. Knapp, 26 Mich. 112; People v. Foley, 59 Mich. 553, 26 N. W. 699; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; Spencer v. State, 77 Ga. 155, 3 S. E. 661, 4 Am. St. Rep. 74; State v. Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

[92] See ante, pp. 115–118, 120, and cases cited.

[93] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; State v. Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

conspirators;[94] but he cannot escape such liability unless he informs them of his purpose to abandon them.[95]

Executed Conspiracy—Merger

We have already seen that if the conspiracy is carried out, and the acts committed amount to a felony, the conspiracy, being a misdemeanor, is at common law merged in the felony, the felony, and not the conspiracy, being punishable; but that it is otherwise where the acts amount to a misdemeanor only.[96] This, as has also been stated, is to a great extent changed by statute.

Statutes

The subject of conspiracy is now regulated to a great extent by statutes in the different states, though in most cases the statute merely declares what was already the common law. There is also an act of Congress making it a crime for two or more persons to conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.[97] This act re-

[94] STATE v. ALLEN, 47 Conn. 121, Mikell Illus. Cas. Criminal Law, 75; Pinkard v. State, 30 Ga. 757. And see ante, pp. 117, 122.

[95] STATE v. ALLEN, 47 Conn. 121, Mikell Illus. Cas. Criminal Law, 75.

[96] Ante, p. 45.

[97] Rev. St. U. S. § 5440. Construction of the act, frauds contemplated, U. S. v. Owen (D. C.) 32 Fed. 534; U. S. v. Carpenter, 6 Dak. 294, 50 N. W. 123. Person incapable of completed crime, conspiring with one who is capable, is liable, U. S. v. Stevens (D. C.) 44 Fed. 132. Conspiracy to fraudulently obtain pension, U. S. v. Adler (D. C.) 49 Fed. 736. Conspiracy between railway officers to deceive the post-office authorities by fraudulent increase of mail during time of weighing for purpose of contract to carry mails, U. S. v. Newton (D. C.) 48 Fed. 218; Id., 52 Fed. 275. Conspiracy to violate interstate commerce act, Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.) 54 Fed. 730, 19 L. R. A. 387; Waterhouse v. Comer (C. C.) 55 Fed. 149, 19 L. R. A. 403.

quires some overt act to be done to effect the object of the conspiracy.[88] There are also other acts of Congress relating to conspiracy.[89]

[88] U. S. v. Reichert (C. C.) 32 Fed. 142.

[89] Conspiracy to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, Rev. St. § 5508. Who are "citizens," Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766. What acts within the statute, U. S. v. Lancaster (C. C.) 44 Fed. 885, 896, 10 L. R. A. 333. It is the right of a citizen to inform a marshal of a violation of the internal revenue laws; and a conspiracy to injure, oppress, threaten, or intimidate him in the exercise of this right, or because of having exercised it, is punishable under this section. In re Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080.

By an act of congress, every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade, or commerce among the several states, and the monopolizing of, or combination with another to monopolize, trade or commerce among the several states, is declared a misdemeanor. Act Cong. July 2, 1890 (c. 647, 26 Stat. 209). Combination to monopolize the coal market, U. S. v. Jellico Mountain Coal & Coke Co. (C. C.) 46 Fed. 432, 12 L. R. A. 753; or lumber market, U. S. v. Nelson (D. C.) 52 Fed. 646. There are also similar statutes in the different states. Whisky trust in violation of federal statute, U. S. v. Greenhut (D. C.) 50 Fed. 469; In re Greene (C. C.) 52 Fed. 104. Right of state corporations to acquire and control products thereof. In re Greene (C. C.) 52 Fed. 104. Meaning of "monopolize," Id. The act of congress of July 2, 1890, applies to combinations between carriers. U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Id., 7 C. C. A. 15, 58 Fed. 58, 24 L. R. A. 73. Combination between insurance companies to control and increase rates is an unlawful trust and combination, in restraint of trade and products. State v. Phipps, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152. A contract between manufacturers of iron pipe in different states, whereby free competition was restrained, and prices determined by a committee, held unlawful. U. S. v. Addyston Pipe & Steel Co., 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. A combination imposing restraint on interstate commerce is unlawful, whether reasonable or unreasonable, and whether or not it actually raises prices.

U. S. v. Coal Dealers' Ass'n of California (C. C.) 85 Fed. 252; U. S. v. Trans-Missouri Freight Ass'n, supra. The act of July 2, 1890, applies to combinations of laborers, as well as capitalists. U. S. v. Workingmen's Amalgamated Council (C. C.) 54 Fed. 994, 26 L. R. A. 158. As to combinations to obstruct mails and interstate commerce, In re Grand Jury (D. C.) 62 Fed. 840; U. S. v. Debs (C. C.) 64 Fed. 724; U. S. v. Cassidy (D. C.) 67 Fed. 698; U. S. v. Elliott (C. C.) 62 Fed. 801; Thomas v. Cincinnati, N. O. & T. P. R. Co. (C. C.) 62 Fed. 803.

CHAPTER VIII

OFFENSES AGAINST THE PERSON

61–62. Homicide in General.
63–64. Distinction between Justifiable and Excusable Homicide.
65. Justifiable Homicide.
66. Excusable Homicide in General.
67. Accident.
68. Excusable Self-Defense.
69. Felonious Homicide in General.
70. Murder.
71–72. Malice Aforethought.
73–74. Manslaughter in General.
75. Voluntary Manslaughter.
76. Involuntary Manslaughter.

HOMICIDE IN GENERAL

61. Homicide is the killing of a human being by a human being,[1] and is either

(a) Justifiable,

(b) Excusable, or

(c) Felonious.

62. To constitute homicide,

(a) A human being must be killed.

(b) The blow or other act must have caused the death.

(c) Death must follow the blow within a year and a day.

Subject of the Homicide

To constitute homicide it is essential that a human being be killed. The killing of a child in its mother's womb may be abortion; but it is not a homicide, for until it is born it is

[1] Stephen, Dig. Cr. Law, art. 218.

not regarded in the law of crimes as a human being.[3] Not only must a child be wholly born to be the subject of this crime, but it must, at the time it died, have had a circulation independent of its mother.[3] It is not essential that it should have breathed,[4] or that the umbilical cord should have been severed at the time of its death.[5] If the child was born and had an independent circulation at the time of its death, it is immaterial that the injury causing its death was inflicted while it was still in its mother's womb.[6]

As a human being is the subject of homicide as soon as it has an independent circulation, so it continues to be until death. Therefore to kill a dying person, whether such person be dying a natural death or be dying from a wound inflicted by another[7] is murder, if the other elements of this crime are present. So of the killing of a criminal under sentence of death.[8]

The Killing

That one may commit homicide the first requisite is that he be the cause of the death of the deceased. The form of the death is immaterial. The cause of the death may be an act, or the death may result from an omission to act. Of course, the act or omission must have been the cause of the

[3] Rex v. Brain, 6 Car. & P. 349.

[3] Rex v. Enoch, 5 Car. & P. 539; Reg. v. Trilloe, 1 Car. & M. 650; Reg. v. Sellis, 7 Car. & P. 850; State v. Winthrop, 43 Iowa, 519, 22 Am. Rep. 257; Wallace v. State, 10 Tex. App. 255.

[4] Rex v. Brain, 6 Car. & P. 349.

[5] Reg. v. Reeves, 9 Car. & P. 25; Reg. v. Trilloe, 2 Moody, 260.

[6] 3 Inst. 50; 1 Hale, P. C. 433; Reg. v. West, 2 Car. & K. 784.

[7] People v. Ah Fat, 48 Cal. 61.

[8] 4 Bl. Comm. 178; 1 Hale, P. C. 497; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154; Evans v. People, 49 N. Y. 86. If one inflicts a mortal wound, which, however, is not the immediate cause of the death, he is not guilty of homicide. Walker v. State, 116 Ga. 537, 42 S. E. 787, 67 L. R. A. 426.

death.[9] It need not, however, be the sole cause;[10] it is sufficient if it were a contributing cause.

[9] Where, in preventing a riot, soldiers shoot at the rioters and accidentally kill a bystander, the rioters are not guilty of any degree of homicide. Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705. So, where the occupant of a house fired at a burglar and accidentally killed an innocent third person, it was held that the burglar was not liable for the death. Com. v. Moore, 121 Ky. 97, 88 S. W. 1085. Where a householder, in repelling burglars, shoots and kills an innocent third party, the burglars are not guilty of the homicide. Com. v. Moore, 121 Ky. 97, 88 S. W. 1085. Where a train robber forced the engineer to occupy a position where it was likely that he would be shot by a passenger resisting the robbery, and he was so shot, it was held that the robber was the cause of the resulting death. Taylor v. State, 41 Tex. Cr. R. 564, 55 S. W. 961. One who, in a quarrel, knocks his opponent down, whereupon a bystander kicks the latter, so as to cause death, is not guilty of such death jointly with the bystander, unless he had reason to expect or induced his interference. People v. Elder, 100 Mich. 515, 59 N. W. 237. Cf. People v. Carter, 96 Mich. 583, 56 N. W. 79. Where road trustees, charged with the duty of making contracts for repair of a road, neglected to do so, whereby the road got out of repair, and a traveler was killed, they were not guilty of manslaughter. Reg. v. Pocock, 5 Cox, Cr. Cas. 172. Imprisoning a man where he may catch smallpox, if death

[10] In Com. v. Costley, 118 Mass. 1, defendant shot B., giving her a mortal wound, and the body of B. was afterward found with a rope tied tightly about the neck. The court held that an instruction that "if any other cause intervened, so as to hasten her death in any degree, then the pistol wound was not the cause of the death," was erroneous. In State v. Hambright, 111 N. C. 707, 16 S. E. 411. A. gave B. a wound in the thigh. B. was taken next day by his own wish by railroad to another town, where he soon afterward died. It was held that "if it be conceded that the removal of the deceased * * * caused the wound—a dangerous one—to produce death, the dying is by law attributed to the wound, and the guilt is imputed to him who inflicted it." Where an officer is endeavoring to arrest one who by reason of his insanity is incapable of committing murder, and the defendant frees the lunatic's hand from the grasp of the officer, thereby enabling the lunatic to shoot the officer, the defendant is criminally responsible for the lunatic's act. Johnson v. State, 142 Ala. 70, 38 South. 182, 2 L. R. A. (N. S.) 897.

The fact that after the blow was given the person injured neglected or refused to take proper care of himself, or to submit to an operation by which he could have been cured, is no defense; nor is it a defense to show that the wound was improperly treated by the surgeon, and that, if it had been properly treated, the deceased might have recovered.[11]

results, may be murder. Castell v. Bambridge, 2 Strange, 854. So of procuring conviction and execution by false testimony,—doubtful. (See Steph. Dig. Cr. Law, art. 221.) Rex v. Macdaniel, Leach (4th Ed.) 44. Assaulting mother with nursing child, thereby causing her to scream, and bringing on convulsions, causing the child's death, may be manslaughter. Reg. v. Towers, 12 Cox, Cr. Cas. 530. In Ex parte Heigho, 18 Idaho, 566, 110 Pac. 1029, 32 L. R. A. (N. S.) 877, Ann. Cas. 1912A, 138, accused attacked another and a fight ensued, accused drew a pistol, and the mother-in-law of the assailed saw the pistol, became greatly excited, and died of a rupture of an aneurism of the aorta. It was held that the fact that her death was caused by fright, fear, or terror alone, without any hostile or overt act directed against her by accused, did not, as matter of law, prevent the homicide from being manslaughter. Taking advantage of or creating a panic in a theater, and obstructing a passage, whereby persons are crushed and killed, may be manslaughter (semble). Reg. v. Martin, 14 Cox, Cr. Cas. 633. Cf. Reg. v. Halliday, 61 Law T. (N. S.) 701. Where, after a fight between defendant and his wife, she left the house, and he barred the door, and she was found dead the next morning in the snow, the court charged that, if defendant used such force and violence as to cause her to leave the house from fear of death or great bodily harm, and "from exposure to cold her death was produced by the said act," he was guilty of manslaughter. This was held erroneous, as authorizing conviction although her fear was not well-grounded or reasonable; and the jury should have been charged that, to convict, they must believe that death by freezing was the natural and probable consequence of leaving the house at the time and under the circumstances. Hendrickson v. Com., 85 Ky. 281, 3 S. W. 166, 7 Am. St. Rep. 596. Where an engineer, in violation of his duty, left his engine unattended, and another wrongfully set it in motion, and a third person was killed thereby, it was held that the engineer was not liable for the resulting death. Hilton's Case, 2 Lew. C. C. 214.

[11] 1 Hale, P. C. 428; Rex v. Rew, Kelyng, 26 (negligence in case of wound); Reg. v. Holland, 2 Moody & R. 351 (refusing to submit to

If, however, the wound was not mortal, and death resulted solely from improper treatment, the accused is not liable.[12] So, also, if a person has been mortally wounded by another, a third person who afterwards kills him by an independent act commits a homicide, though he merely hastened a death which was bound to happen without his interference.[13] In such case the person who struck the first blow, though it would have resulted in death, is not liable for the homicide.[14] If a wound causes disease or necessitates amputa-

treatment); Reg. v. Davis, 15 Cox, Cr. Cas. 174 (death caused by chloroform necessary to treatment); Com. v. Hackett, 2 Allen (Mass.) 136; Com. v. McPike, 3 Cush. (Mass.) 184, 50 Am. Dec. 727; State v. Bantley, 44 Conn. 537, 26 Am. Rep. 486; People v. Cook, 39 Mich. 236, 33 Am. Rep. 380; Crum v. State, 64 Miss. 1, 1 South. 1, 60 Am. Rep. 44; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122 (lessening chances of recovery by use of intoxicants); State v. Smith, 73 Iowa, 32, 34 N. W. 597; State v. Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; Bowles v. State, 58 Ala. 335; State v. Baker, 46 N. C. 267; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Sharp v. State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27; Clark v. Com., 90 Va. 360, 18 S. E. 440 (unskillful treatment); Com. v. Eisenhower, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670. But see Coffman v. Com., 10 Bush (Ky.) 495.

[12] Crum v. State, 64 Miss. 1, 1 South. 1, 60 Am. Rep. 44; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Parsons v. State, 21 Ala. 300; Smith v. State, 50 Ark. 545, 8 S. W. 941.

[13] Reg. v. Plummer, 1 Car. & K. 600; People v. Ah Fat, 48 Cal. 61. Where accused shot deceased in necessary self-defense, and then shot him again as he was fleeing, both wounds being mortal, it was held that if the second shot was fired when it was not necessary for defendant to further defend himself, and it contributed in any degree to the death of the deceased, defendant was guilty of felonious homicide. Caughron v. State, 99 Ark. 462, 139 S. W. 315.

[14] State v. Scates, 50 N. C. 420; State v. Wood, 53 Vt. 560. But where A. shot B. in the abdomen, giving him a mortal wound, and B. within a few minutes cut his own throat, giving himself a wound from which he would have died within five minutes, it was held that A. was guilty of homicide, since the wound given by A. contributed to the death. The court said: "When the throat was cut Farrell was not merely languishing from a mortal wound. He was actually

tion of a limb, and death results from the disease or amputation, the wound is the cause of death, in the eye of the law, and the person who inflicted it must answer for the homicide;[15] but it is otherwise if the disease is not connected with the wound in the relation of cause and effect.[16] It is immaterial that without the act or omission the death would have resulted from another cause; for example, that the person killed was diseased, or already wounded by another, and was likely, or even sure, to die when the blow was given.[17]

Time of Death

The death must have resulted within a year and a day after the blow was given, or other act done which is alleged as the cause of death; otherwise, the law conclusively presumes that death resulted from some other cause.[18]

dying, and after the throat was cut he continued to languish from *both* wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to that event." Temple, J., in PEOPLE v. LEWIS, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783, Mikell Illus. Cas. Criminal Law, 98.

[15] Denman v. State, 15 Neb. 138, 17 N. W. 347; Powell v. State, 13 Tex. App. 244; Burnett v. State, 14 Lea (Tenn.) 439 (where death resulted from pneumonia, for jury whether assault contributed to pneumonia).

[16] Livingston v. Com., 14 Grat. (Va.) 592; Bush v. Com., 78 Ky. 268.

[17] 1 Hale, P. C. 428; Reg. v. Haines, 2 Car. & K. 368; Com. v. Fox, 7 Gray (Mass.) 585; People v. Ah Fat, 48 Cal. 61; State v. Castello, 62 Iowa, 404, 17 N. W. 605; State v. Smith, 73 Iowa, 32, 34 N. W. 597; State v. Morea, 2 Ala. 275; People v. Lanagan, 81 Cal. 142, 22 Pac. 482; Smith v. State, 50 Ark. 545, 8 S. W. 941; State v. O'Brien, 81 Iowa, 88, 46 N. W. 752. Although the first shot was in self-defense, if the second was not excusable, and contributed to or accelerated death, defendant was guilty of homicide. Rogers v. State, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154.

[18] State v. Orrell, 12 N. C. 139, 17 Am. Dec. 563.

Proof of Death

The rule is that there can be no conviction of a felonious homicide on circumstantial evidence unless the body of the person alleged to have been killed has been found, or at least accounted for. It is not enough to merely show that it is missing,[19] but there must be direct proof of death. This requirement is satisfied if, for example, parts of the body are found, and marks and indications point to the identity of the deceased.[20] Even the confession of the accused made out of court is not alone sufficient,[21] but it is admissible, and may be sufficient if corroborated by the circumstances and the other evidence.[22]

[19] 2 Hale, P. C. 290; Ruloff v. People, 18 N. Y. 179. But see State v. Williams, 46 Or. 287, 80 Pac. 655, where it was held that, though there is no direct evidence, in a prosecution for murder that the person alleged to have been murdered was in fact dead, circumstantial evidence, if convincing beyond a reasonable doubt, is sufficient to prove the corpus delicti.

[20] Rex v. Clewes, 4 Car. & P. 221; People v. Beckwith, 108 N. Y. 67, 15 N. E. 53; People v. Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State v. Williams, 52 N. C. 446, 78 Am. Dec. 248; State v. Smith, 9 Wash. 341, 37 Pac. 491.

[21] State v. German, 54 Mo. 526, 14 Am. Rep. 481; People v. Lane, 49 Mich. 340, 13 N. W. 622; People v. Hennessey, 15 Wend. (N. Y.) 147; Stringfellow v. State, 26 Miss. 157, 59 Am. Dec. 247; State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404; State v. Lallyer, 4 Minn. 368 (Gil. 277).

[22] People v. Beckwith, 108 N. Y. 67, 15 N. E. 53; People v. Deacons, 109 N. Y. 374, 16 N. E. 676; State v. Coats, 174 Mo. 396, 74 S. W. 864.

DISTINCTION BETWEEN JUSTIFIABLE AND EXCUSABLE HOMICIDE

63. A homicide is justifiable where the person committing it is not in fault, but kills in strict performance of a legal duty.

64. A homicide is excusable where the person committing it is to some degree in fault, but the circumstances are such that he does not deserve punishment.

The distinction between justifiable and excusable homicide was once of importance, due to the fact that excusable homicide was punished by forfeiture of goods, while no punishment of any kind followed justifiable homicide. At the present day the exemption from any punishment is as full in the one case as in the other. Neither entails any responsibility; so the distinction is no longer of any practical importance.

The terms have, however, become engrafted in our jurisprudence and are still used by text-writers and judges to distinguish homicides committed under different circumstances.

JUSTIFIABLE HOMICIDE

65. A homicide is justifiable,[28]

(a) Where the proper officer executes a person legally sentenced to death, in strict conformity with his sentence.

(b) Where an officer, or one acting in his aid, in the due execution of his office, kills one who is forcibly resisting his attempt to arrest, provided there is apparent necessity for the killing to protect the life

[28] Fost. Crown Law, 267.

of the one making the arrest or to save him from serious bodily harm.

(c) Where a person lawfully imprisoned or under arrest for a serious crime, or another in his behalf, assaults the officer having him in charge, and the officer, to prevent the prisoner's escape, kills him or such other person, provided there is apparently no other way to prevent the escape or rescue.

(d) Where an officer or a private person, having legal authority to arrest for a felony, attempts to do so, and, on the flight of the person sought to be arrested, kills him in pursuit, provided, however, there is no other way in which the arrest can be made.

(e) Where an officer or private person, in endeavoring to disperse the mob in a riot, kills one or more of the parties, not being able otherwise to suppress the riot.

(f) Where the homicide is necessarily committed in preventing one from committing a felony by force or surprise.

In all the cases above mentioned the killing is done in compliance with a legal duty, and is therefore said to be justifiable, rather than excusable, in that no fault whatever attaches. If this legal duty is absent, there can be no justification, though, as will presently be seen, there may be an excuse.

Executing Criminals

To justify execution of a criminal sentenced to death, the execution must be by the proper officer, the prisoner must have been legally convicted and sentenced by a competent court, and the sentence must be strictly carried out.

If an officer who is not charged with the duty of executing a criminal under sentence of death were to execute the sentence, he would be guilty of murder; and, if the court which tries and convicts the prisoner and sentences him is without jurisdiction, both the judge and the officer executing the sentence will be guilty of murder. The sentence must be strictly executed. An officer would be guilty of a felonious homicide in beheading, shooting, or executing by electricity a criminal sentenced to be hung.[24]

Homicide in Making Arrest or Preventing Escap

If a legal arrest by an officer, or one aiding him, is forcibly resisted, he may overcome such force by the use of greater force in order to complete the arrest, whether the arrest be for a felony, a misdemeanor, or even in a civil suit.[25] If the resistance is such that the officer's life is put in danger or he is menaced with serious bodily harm, he need not desist from making the arrest, but may kill in self-defense.[26]

It has been held that even where the arrest was for a misdemeanor the officer might kill to effect the arrest.[27] The better view is, however, that he cannot kill merely to effect an arrest for a civil wrong or for a misdemeanor. In these cases, if the force used against the officer does not threaten him with serious bodily harm, he may not kill, even though the person he is attempting to arrest thereby

[24] 4 Bl. Comm. 178, 179; 1 Hale, P. C. 433, 501; 1 Hawk. P. C. 70.

[25] 1 Hale, P. C. 494; 4 Bl. Comm. 179; 1 Russ. Crimes (9th Am. Ed.) 893; State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; State v. Anderson, 1 Hill (S. C.) 327; State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359; Clements v. State, 50 Ala. 117; State of North Carolina v. Gosnell (C. C.) 74 Fed. 734; Lynn v. People, 179 Ill. 527, 48 N. E. 964.

[26] U. S. v. Rice, 1 Hughes, 560, Fed. Cas. No. 16,153.

[27] State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359.

effects his escape; it being considered better that a mere misdemeanant escape for the time being than that his life be taken.[28]

After an arrest has once been made, and the offender is in custody, the officer having him in charge may kill him to prevent his escape, if the arrest is for a felony, or if the officer's life is endangered, or he is threatened with serious bodily harm by the prisoner; and he may, under like circumstances, kill others who are seeking to rescue the prisoner.[29] By the better view, if the arrest is for a misdemeanor only, and the prisoner attempts to avoid arrest by flight, the officer cannot kill.[30] In those jurisdictions where it is held that an officer cannot kill to effect an arrest for a misdemeanor, it is also held that he cannot kill to prevent the escape of one in custody for a misdemeanor, as this is virtually a rearrest.[31]

In civil cases and in cases of misdemeanor, where a person sought to be arrested does not assault the officer and forcibly resist the attempt to arrest, but flees, the officer cannot kill him in pursuit, but he must rather suffer him to escape.[32] It is otherwise in case of felonies. A fleeing felon

[28] Head v. Martin, 85 Ky. 480, 3 S. W. 622; Dilger v. Com., 88 Ky. 550, 11 S. W. 651; Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

[29] Fost. Crown Law, 321; 1 Hale, P. C. 496; 2 East, P. C. 821; 4 Bl. Comm. 179; Jackson v. State, 76 Ga. 473. There must be necessity, and the officer is not the arbitrary judge as to whether it exists. State v. Bland, 97 N. C. 438, 2 S. E. 460.

[30] Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; Handley v. State, 96 Ala. 48, 11 South. 322, 38 Am. St. Rep. 81; U. S. v. Rice, 1 Hughes, 560, Fed. Cas. No. 16,153; Lewis v. Com., 140 Ky. 652, 131 S. W. 517; Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757.

[31] See cases in previous note.

[32] Fost. Crown Law, 291; State v. Moore, 39 Conn. 244; Dilger v. Com., 88 Ky. 550, 11 S. W. 651.

may be killed if he cannot otherwise be taken.[33] In all of these cases it must be borne in mind that the killing must be apparently necessary.[34] Whenever an officer would be justified under the rules above stated, a private person having authority to arrest will be justified.

Suppression of Riot or Affray

An officer is charged with the duty of suppressing riots and affrays. A private person has the right to suppress them, and is probably even bound to do so as well as the officer. In order to suppress a riot, life may be taken, if necessary, either by an officer or by a private person, but it must not be needlessly taken.[35] A person is not justified, however, in taking life to suppress an affray, as it cannot be necessary to go to such an extreme.[36] Of course, if a person's life is put in imminent danger while he is engaged in an attempt to stop an affray, or grievous bodily harm is imminent, at the hands of the wrongdoers, he may kill to save himself; but his justification under these circumstances stands on a higher ground than the mere right to suppress an affray. He will be justified in taking life to save himself in such case, and not merely excused, for he is in no fault, but is performing a legal duty in interfering.

[33] 1 East, P. C. 302; Rex v. Finnerty, 1 Craw. & D. 167; Jackson v. State, 66 Miss. 89, 5 South. 690, 14 Am. St. Rep. 542; State v. Roane, 13 N. C. 58.

[34] 4 Bl. Comm. 180; Rex v. Allen, 7 Car. & P. 153; Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; Clements v. State, 50 Ala. 117; Wright v. State, 44 Tex. 645.

[35] 1 Hale, P. C. 495; 4 Bl. Comm. 179; 2 Bish. Cr. Law, § 655; Pond v. People, 8 Mich. 150. But see Patten v. People, 18 Mich. 314, 100 Am. Dec. 173.

[36] People v. Cole, 4 Parker, Cr. R. (N. Y.) 35; Conner v. State, 4 Yerg. (Tenn.) 137, 26 Am. Dec. 217.

Homicide in Prevention of Felony

It is said that it is not only every person's right, but it is his legal duty, to prevent a felony, even though he must go to the extreme of taking the life of the person attempting to commit it.[37] If, therefore, it is necessary to take the life of a person attempting to commit a felony in order to prevent him from consummating his design, the homicide is justifiable, not excusable merely.[38]

But one cannot justify a killing on the ground that it was done to prevent a felony, if he himself has provoked the felony with the object of killing the felon.[39]

Since the justification for the homicide is based on the necessity of preventing a felony, if the felony can be prevented by any less violent means, the homicide will not be justifiable, or even excusable.[40]

It is in this sense only that it is essential, in order to make the homicide justifiable, or at least excusable, to show that the killing was necessary. Under the doctrine of mistake of fact it is not necessary to show in defense that the deceased was in fact about to commit a felony and that therefore it was necessary to kill him to prevent the felony from being actually committed. It is sufficient to show that the defendant reasonably thought the deceased was about to commit a felony, and, that, thinking so, there was no other means of preventing it.[41]

[37] 1 East, P. C. 271; State v. Harris, 46 N. C. 190; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; State v. Rutherford, 8 N. C. 457, 9 Am. Dec. 658; State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; Staten v. State, 30 Miss. 619; People v. Payne, 8 Cal. 341; State v. Turlington, 102 Mo. 642, 15 S. W. 141.

[38] 1 Hale, P. C. 485, 486; 4 Bl. Comm. 180.

[39] Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493.

[40] Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493.

[41] Rex v. Scully, 1 Car. & P. 319; Ruloff v. People, 45 N. Y. 215;

The justification is not limited to the person upon whom the felony is attempted, but extends to every person who may be in a position to prevent it. If the belief that the felony is about to be committed is negligently adopted, the killing will be manslaughter.[42] From the nature of things, it cannot be necessary to kill to prevent a felony unless the felony is attempted by force or surprise, as in case of a sudden and violent assault with intent to kill or to rape, or in case of burglary, robbery, or arson. Larceny is a felony committed without force, generally by stealth, or at most by a mere trespass without violence, for a forcible attempt to steal would amount to an attempt to commit robbery, and an attempt at larceny is therefore no justification for killing the thief.[43] A woman is justified in killing a man who attempts to rape her, and a man is justified in killing one who is attempting to ravish his wife, daughter, or sister, or any other woman.[44] Here the felony is forcibly attempted. A husband or brother would not be justified in killing a man who is attempting to seduce and debauch his wife or sister by fraudulent means, and not by force.[45] If

People v. Angeles, 61 Cal. 188. See, also, cases cited in following notes.

[42] Levet's Case, 1 Hale, P. C. 474.

[43] Reg. v. Murphy, 2 Craw. & D. 59; State v. Vance, 17 Iowa, 138; STOREY v. STATE, 71 Ala. 329, Mikell Illus. Cas. Criminal Law, 103.

[44] 4 Bl. Comm. 181; People v. Angeles, 61 Cal. 188.

[45] People v. Cook, 39 Mich. 236, 33 Am. Rep. 380. Not wholly justifiable or excusable, in the absence of statute, for a husband to kill his wife's paramour while in the act of adultery. Hooks v. State, 99 Ala. 166, 13 South. 767. See, also, post, p. 224, notes 6, 7. In Georgia, a husband or intended husband may kill to prevent the debauching of his daughter, wife, or affianced wife. Futch v. State, 90 Ga. 472, 16 S. E. 102; Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630; Gossett v. State, 123 Ga. 431, 51 S. E. 394. But there must be urgent danger. Jackson v. State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep.

the felony can be otherwise prevented, a homicide is not justified. It is therefore a felonious homicide to kill one who is attempting a felony if there is an opportunity to arrest him.[46] The killing must be in the prevention of a felony, and therefore killing in pursuit, without a warrant, of one who has abandoned his attempt to commit the felony, and fled, is not justifiable.[47] It has been held that a person is not justified in killing one who is at the time in the act of committing a felony, if he does not know that he is so engaged, and does not kill him for that reason.[48] But this seems to be contrary to the general principle that a defendant may rely on any fact which justifies him in law, though he was ignorant of it when the transaction occurred.[49]

22; Farmer v. State, 91 Ga. 720, 18 S. E. 987. But see Biggs v. State, supra. A father cannot kill to prevent fornication with, or seduction of, his daughter. Bone v. State, 86 Ga. 108, 12 S. E. 205. But in a recent case in Georgia it was held that a man who, upon finding that another man had been having sexual intercourse with the former's daughter with her consent, shot and killed the man, was justified if the killing was necessary to prevent further acts of fornication, where the circumstances indicated that the illicit relationship would be continued. Miller v. State, 9 Ga. App. 599, 71 S. E. 1021. But see Varnell v. State, 26 Tex. App. 56, 9 S. W. 65. A son is not justified in killing a man because of adultery with his mother. State v. Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289.

[46] Rex v. Scully, 1 Car. & P. 319; State v. Roane, 13 N. C. 58. In State v. Bonofiglio, 67 N. J. Law, 239, 52 Atl. 712, 54 Atl. 99, 91 Am. St. Rep. 423, it is held that a person upon whom an attempt to rob is being made is justified in taking the life of his assailant, even when other and less radical means would render the attempt abortive. His right to kill, it is said, is absolute.

[47] 1 Whart. Cr. Law, § 497; State v. Rutherford, 8 N. C. 457, 9 Am. Dec. 658; Bowman v. State (Tex. Cr. App.) 21 S. W. 48. Contra, under Texas statute, in case of burglary and theft by night under certain circumstances. Whitten v. State, 29 Tex. App. 504, 16 S. W. 296.

[48] Reg. v. Dadson, 4 Cox, Cr. Cas. 358; People v. Burt, 51 Mich. 200, 16 N. W. 378.

[49] See 1 Bish. New Cr. Law, § 441.

Justifiable Defense of Person

A homicide may be justifiable on more than one ground. We have just seen that a homicide is justifiable when committed for the purpose of preventing a felony attempted by force. If the felony attempted be directed against the person, the killing of the person attempting the felony may be justifiable, not only on the ground of preventing the felony but also on the ground of self-defense.

In the course of a sudden affray between two persons, both being in the eye of the law in fault in engaging in the affray, neither can kill the other, though it be necessary to save his own life, without first retreating as far as he can with safety. If he kills without retreating, he is guilty of at least manslaughter.[50]

On the other hand, if he is entirely without fault, as where he is attacked with murderous intent or with intent to do him serious bodily harm, the authorities are in conflict as to whether he must retreat before taking the life of his adversary, or whether he may stand his ground and kill when he might, by retreating, save his life without taking the life of his antagonist.[51] In some jurisdictions it is held that there is no duty to retreat in these circumstances.[52] In others it is held that even in the case of a murderous assault the person assaulted must retreat under all circumstances,

[50] Reg. v. Hewlett, 1 Fost. & F. 91; State v. Thompson, 9 Iowa, 192, 74 Am. Dec. 342; and see cases cited, post, p. 199, footnotes 15, 16.

[51] See a discussion of the necessity to retreat from a murderous assault in 16 Harv. L. Rev. 567.

[52] La Rue v. State, 64 Ark. 144, 41 S. W. 53 (but see Elder v. People, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220); McClurg v. Com., 86 S. W. 14, 17 Ky. Law Rep. 1339; Ragland v. State, 111 Ga. 211, 86 S. E. 682; Ritchey v. People, 23 Colo. 314, 47 Pac. 272, 384; State v. Kennedy, 7 Nev. 374; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52.

except when he is attacked in his dwelling, if he can safely do so.[53] Others hold that he need not retreat from a murderous attack in the immediate vicinity of his dwelling, in his curtilage.[54] In others he is allowed to stand his ground and kill his assailant anywhere on his own premises.[55]

The right of self-defense is not limited to defense of life. A person may kill another to prevent grievous bodily harm.[56] In no case, however, can the plea of justifiable or excusable self-defense be sustained unless the killing was apparently necessary to save life or prevent grievous bodily harm.[57] If one is attacked with a deadly weapon, he may assume that the intention is to kill him, and may act on that assumption;[58] but he has no

[53] Davison v. People, 90 Ill. 221; Com. v. Drum, 58 Pa. 9; Henson v. State, 120 Ala. 316, 25 South. 23; Pond v. People, 8 Mich. 150; State v. Zeigler, 40 W. Va. 593, 21 S. E. 763.

[54] Fitzgerald v. State, 1 Shan. Cas. (Tenn.) 505; Haynes v. State, 17 Ga. 465; State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

[55] Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528; Baker v. Com., 93 Ky. 302, 19 S. W. 975.

[56] State v. Benham, 23 Iowa, 154, 92 Am. Dec. 416; State v. Burke, 30 Iowa, 331; State v. Sloan, 47 Mo. 604; People v. Campbell, 30 Cal. 312; Young v. State, 11 Humph. (Tenn.) 200. This will also appear from the cases cited in the other notes.

[57] May not take life to prevent unlawful arrest. Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193; State v. Cantleny, 34 Minn. 1, 24 N. W. 458. A person attacked or formidably threatened by three persons acting in concert may avail himself of the right of self-defense by using commensurate force against the nearest assailant, although it is not from him, but from the others, that great bodily harm is apprehended. Hoy v. State, 69 Neb. 516, 96 N. W. 228. The right of self-defense does not belong alone to persons engaged in the pursuit of their lawful business; it is available to every person, regardless of the nature of his business, who is assaulted, or who, upon just grounds, apprehends an immediate unlawful attack. Id.

[58] Kingen v. State, 45 Ind. 518; State v. Donnelly, 69 Iowa, 705, 27 N. W. 369, 58 Am. Rep. 234.

right to kill one who strikes him with his fist, or with an instrument not likely to cause grievous bodily harm.[59] Nor is he justified in killing a person who has threatened him, and who he supposes intends to take his life, until some overt act is done by the latter evincing a purpose to carry out such intention immediately.[60] It is not meant by this that he must actually wait for the blow before acting in his defense,[61] nor even that his assailant must be within actual striking distance.[62] It is held by most of the courts that it is sufficient if the attack is apparently imminent, though some courts require actual danger. The rules as to imminence of danger will be discussed in treating of excusable homicide.[63] It is not necessary to repeat them here. One who seeks a person who intends to kill him, or otherwise brings the danger upon himself, cannot avail himself of the plea of self-defense;[64] but it is not to be inferred from this that he is bound to keep in hiding, or otherwise give up his freedom, in order to keep out of the other's way.[65] He sim-

[59] Stewart v. State, 1 Ohio St. 66; Scales v. State, 96 Ala. 69, 11 South. 121; Smith v. State, 142 Ind. 288, 41 N. E. 595.

[60] 2 East, P. C. 271; Dyson v. State, 26 Miss. 362; People v. Lombard, 17 Cal. 316; People v. Scoggins, 37 Cal. 676; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; State v. Thompson, 83 Mo. 257; Stoneman v. Com., 25 Grat. (Va.) 887; Henderson v. State, 77 Ala. 77; Barnards v. State, 88 Tenn. 183, 12 S. W. 431, at page 443; State v. Jackson, 32 S. C. 27, 10 S. E. 769; State v. Jackson, 44 La. Ann. 160, 10 South. 600; State v. Howard, 35 S. C. 197, 14 S. E. 481; McDuffie v. State, 90 Ga. 786, 17 S. E. 105; Craig v. State (Tex. Cr. App.) 23 S. W. 1108.

[61] State v. McDonald, 67 Mo. 13; Bohannon v. Com., 8 Bush (Ky.) 481, 8 Am. Rep. 474.

[62] Fortenberry v. State, 55 Miss. 403.

[63] Post, p. 194.

[64] Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039.

[65] Oder v. Com., 80 Ky. 32; Philips v. Com., 2 Duv. (Ky.) 328, 87 Am. Dec. 499; Bohannon v. Com., 8 Bush (Ky.) 481, 8 Am. Rep. 474; Com. v. Barnes (Ky.) 16 S. W. 457; People v. Gonzales, 71 Cal. 569,

ply must not seek the danger. If self-defense is required, and the person assailed is not in the wrong, the fact that he entertains malice and ill feeling towards his assailant is immaterial.[66] We have already stated that, if a murderous assault is made on a person, he is not bound to retreat, but may stand his ground. This is not the case where the assault is not murderous or with intent to kill. Here the person assaulted must do what he can, by retreat or otherwise, to avoid the necessity of taking life. He may resist the assault by opposing force to force,[67] but he cannot take his assailant's life until he has retreated "to the wall," or as far as his safety will allow.[68] His duty and liability under such circumstances will be discussed in treating of excusable homicide. A person may resist an attempt to unlawfully arrest him, or to falsely imprison him, just as he may resist any other assault or trespass, by opposing force to force; but he cannot go to the extreme of taking life or using a deadly weapon, unless it becomes necessary to save his life or prevent grievous bodily harm.[69] Mr. Bishop

12 Pac. 783; Smith v. State, 25 Fla. 517, 6 South. 482; People v. Lyons, 110 N. Y. 618, 17 N. E. 391. An instruction that defendant could not avail himself of the plea of self-defense if, apprehending danger from the conduct of the deceased when he drove by him, he returned by the same way, which was the proper and convenient road home, having armed himself in the meantime, is erroneous. Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. See, also, Allen v. U. S., 157 U. S. 675, 15 Sup. Ct. 720, 39 L. Ed. 854; State v. Evans, 124 Mo. 397, 28 S. W. 8.

[66] People v. Macard, 73 Mich. 15, 40 N. W. 784.

[67] Post, p. 272.

[68] Post, p. 199.

[69] Creighton v. Com., 83 Ky. 142, 4 Am. St. Rep. 143, Id., 84 Ky. 103, 4 Am. St. Rep. 193; State v. Row, 81 Iowa, 138, 46 N. W. 872; Palmer v. People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454. But see State v. Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845.

states that it would be otherwise where he would be taken beyond the reach of the laws.[70] We have in another connection considered the right of a person to take the life of an innocent third person to save his own.[71]

Defense of Habitation

A man's house is his castle, and he is never bound to retreat from it if he is attacked therein, whether the attack be a felonious one or amount only to a misdemeanor. He may stand his ground there and resist the attack, and, if necessary, kill his assailant to save himself from death or serious bodily injury.[72]

A distinction must be made here between an attack on the house and an attack on the inmates of the house. If the attack is on an inmate of the house, it is a case of self-defense, and the rules of self-defense apply, except that in all jurisdictions the inmate need not retreat, even though the attack is not a felonious one, and though he might, by retreating, save his life without taking the life of his assailant;[73] whereas, as we have seen, in some jurisdictions in the ordinary case of self-defense the assailed must retreat if the attack is not felonious and he can safely do so before killing his assailant.

[70] 1 Bish. New Cr. Law, § 868.

[71] Ante, p. 104.

[72] 1 Hale, P. C. 458; Wright v. Com., 85 Ky. 123, 2 S. W. 904; Pond v. People, 8 Mich. 150, at page 177; State v. Peacock, 40 Ohio St. 333; Corey v. People, 45 Barb. (N. Y.) 262; State v. Taylor, 82 N. C. 554; CARROLL v. STATE, 23 Ala. 28, 58 Am. Dec. 282, Mikell Illus. Cas. Criminal Law, 105; Baker v. Com., 93 Ky. 302, 19 S. W. 975. Necessity for killing, State v. Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106. Root house or outdoor cellar a part of dwelling, People v. Coughlin, 67 Mich. 466, 35 N. W. 72. Room used as store, where man slept under arrangement with tenant, not his dwelling. State v. Smith, 100 Iowa, 1, 69 N. W. 269. Guest may resist as if in his own house. Crawford v. State, 112 Ala. 1, 21 South. 214.

[73] See authorities cited in note 72.

If, however, the attack is not directed against the person of an inmate, but only against the house as property, the better opinion is that the trespasser cannot be killed merely to prevent the trespass.[74] If the trespasser is attempting to enter by force or surprise for the purpose of committing a felony, whether upon the inmates or upon property, the rules governing the right to kill to prevent a felony apply. Thus, if the entry is sought to be made for the purpose of committing larceny, or rape, or murder, or any other felony, the attempt to enter is an attempt to commit burglary, which is a felony, and the killing of the intruder may be justified on the ground of the prevention of a felony.[75] But if one should throw stones into a dwelling, or attempt to enter for the purpose merely of annoying or insulting the inmates, this would be only a misdemeanor, and a killing of the trespasser would not be justifiable.[76]

After a person has entered, an assault by him may be resisted to the death. There is no duty to retreat in order to avoid the necessity to kill.[77] Here, though, as well as in

[74] CARROLL v. STATE, 23 Ala. 28, 53 Am. Dec. 282, Mikell Illus. Cas. Criminal Law, 105; Greschia v. People, 53 Ill. 295. See, also, State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200. Cf. State v. Countryman, 57 Kan. 815, 48 Pac. 137.

[75] People v. Lilly, 38 Mich. 270.

[76] See State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200.

[77] Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; People v. Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151; State v. Middleham, 62 Iowa, 150, 17 N. W. 446; Brinkley v. State, 89 Ala. 34, 8 South. 22, 18 Am. St. Rep. 87; Bledsoe v. Com. (Ky.) 7 S. W. 884; Willis v. State, 43 Neb. 102, 61 N. W. 254; place of business is within the rule, Perry v. State, 94 Ala. 25, 10 South. 650; as is also a rented room occupied as a bedroom, Harris v. State, 96 Ala. 24, 11 South. 255. The rule does not apply outside the curtilage, Lee v. State, 92 Ala. 15, 9 South. 407, 25 Am. St. Rep. 17, nor to the yard when retreat into the house is possible, Watkins v. State, 89 Ala. 82, 8 South. 134; nor does the rule apply after retreating from house, Martin v. State, 90 Ala. 602, 8 South. 858, 24

other cases, no unnecessary force can be used.[78] The life of the assailant cannot be taken except to save life or to avoid grievous bodily harm, or to prevent a felony. Where a person has by force, actual or constructive, entered another's house, the latter may eject him, and may use all necessary [79] force in doing so, at least short of taking life or doing serious bodily harm, and if in so doing the intruder resists and places the owner's life in danger, the latter may kill in self-defense. In such case, as the entry was by force, no request to leave is necessary before proceeding to expel the intruder. If, however, a person, either expressly or impliedly, permits another to enter his house, he cannot eject him without having previously requested him to leave, and can use no unnecessary force.[80]

Am. St. Rep. 844. Stable yard not within the rule, Perry v. State, 94 Ala. 25, 10 South. 650. Need not retreat when in "yard." Eversole v. Com., 95 Ky. 623, 26 S. W. 816; State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883. Person assailed need not retreat when on his own premises, near his dwelling house. Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086. Cf. Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547. One finding a man trying to obtain access to his wife's room in the night by opening a window may employ necessary force, and, if put in fear of life or great bodily harm, need not retreat, but may use necessary force to repel assault. Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051. One who is attacked at his own dwelling does not have the right to stand and kill his assailant, unless he is free from fault in bringing on the difficulty. Sanford v. State, 2 Ala. App. 81, 57 South. 134. Where a father, who was attacked by his son in a house where both resided, shot and killed his assailant without attempting to escape, it was held to be excusable homicide. "The owner of a dwelling attacked therein is not bound to flee, but may stand his ground and kill his assailant." People v. Tomlins, 213 N. Y. 240, 107 N. E. 496.

[78] State v. Middleham, 62 Iowa, 150, 17 N. W. 446; State v. Murphy, 61 Me. 56; Pond v. People, 8 Mich. 150. See, also, cases cited in preceding note.

[79] Cannot use unnecessary force; death caused by an unnecessary kick is manslaughter. Wild's Case, 2 Lewin, Cr. Cas. 214.

[80] State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Smith,

Defense of Property

A person may use all reasonable and necessary force, short of taking life, in defense of his property, real or personal, and to prevent another from dispossessing him of it; but he cannot under any circumstances be justified in killing merely to defend his property.[81] If a man attack me, and tries to take my property by force, he attempts a robbery, and I may kill him to prevent the felony. The justification does not rest on my right to defend my property. If a man attempts to set fire to my dwelling house by surprise, and I can only prevent it by killing him, I may do so; but the reason is because I may prevent the felony, and not because, if I do not kill him, I will lose my property. If the house were uninhabited, and therefore not the subject of arson, I would have no right to kill him, though my loss of property would be as great. If an assault is made on a person without felonious intent, he may resist the attack, and return blow for blow; and if, during the difficulty, his life is sought to be taken, or grievous bodily harm is sought to be inflicted, he may kill his adversary to prevent it. In such case, as he is engaged in mutual combat, which he could have avoided, he is in some degree in fault, in the eye of the law, and is merely excused, not

20 N. C. 117; Lyon v. State, 22 Ga. 399; Greschia v. People, 53 Ill. 295; State v. Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31.

[81] Reg. v. Archer, 1 Fost. & F. 351; U. S. v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; STATE v. MORGAN, 25 N. C. 186, 38 Am. Dec. 714, Mikell Illus. Cas. Criminal Law, 107; State v. McDonald, 49 N. C. 19; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; State v. Gilman, 69 Me. 169, 31 Am. Rep. 257; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; State v. Vance, 17 Iowa, 138; State v. Kennedy, 20 Iowa, 569; Kunkle v. State, 32 Ind. 220; Combs v. Com. (Ky.) 9 S. W. 655; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; Davison v. People, 90 Ill. 221; State v. Donyes, 14 Mont. 70, 35 Pac. 455; Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039 (repelling trespass on land).

justified. This consideration subjects him to the rules of excusable homicide. The same principle applies to defense of property. A person may resist a trespass on his property, real or personal, not amounting to a felony, or a removal or destruction of his property not feloniously attempted, by the use of any reasonable or necessary force, short of taking or endangering life; but if he is unable to prevent it, and there is no felony attempted, he must suffer the trespass and the loss of the property, and seek redress at the hand of the law, rather than commit a homicide.[83] If, in the course of the struggle, the trespasser seeks to take the owner's life, the latter will be excused if he kills him.[83] He will not be justified, but merely excused, and the rules of excusable homicide requiring retreat will apply.

Same—Setting Spring Guns

It is said by many text-writers that a man may set a spring gun in his dwelling, so that it will kill a person attempting to enter to commit a felony. The reason given is that, since a person is justified in killing one who is attempting to commit a felony by force or surprise in order to prevent the felony, he may do the same thing indirectly—by means of a spring gun or other mechanical contrivance operated by the felon himself. Dicta in a few cases maintain the same view.[84] But the rule that a person is justified in

[83] Kendall v. Com. (Ky.) 19 S. W. 173; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; State v. Smith, 12 Mont. 378, 30 Pac. 679; Powers v. People, 42 Ill. App. 427; Drew v. State, 136 Ga. 658, 71 S. E. 1108.

[83] White v. Washington Territory, 3 Wash. T. 397, 19 Pac. 37.

[84] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Gray v. Combs, 7 J. J. Marsh. (Ky.) 478, 23 Am. Dec. 431. See, also, Johnson v. Patterson, 14 Conn. 1, 35 Am. Dec. 96; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339. A statute in England allows the setting of spring guns in dwelling houses.

killing one who is attempting to commit a felony by force or surprise is limited to cases in which such killing is necessary to prevent the felony. If the owner of the house were present at the place of entry, he could not kill the burglar if he could with safety to himself prevent, otherwise, the entry. This being so, it would seem that he cannot do indirectly what he could not do directly; and it would also seem that he cannot enlarge his rights by being absent.[85]

It is now admitted that a person cannot set spring guns on his premises outside of his dwelling, so as to kill persons who may merely trespass, as he would have no right to resist a mere trespass to the death. In any event, he must not place them where they will endanger the lives of persons passing along the public street or road adjoining the premises.[86]

[85] See Johnson v. Patterson, 14 Conn. 1, 35 Am. Dec. 96.

[86] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159. B., who was boarding with C., placed a spring gun in his trunk in such a position as to kill any one who opened the trunk. C., though warned by B. of these facts, moved by curiosity and without right, sought to open the trunk and was killed by the spring gun. On an indictment of B. for murder it was held that one may not take life by indirect means under circumstances that would not justify him in taking life directly, and that one may not take life to prevent a mere trespass to or theft of property. The court further held that B.'s warning to C. of the presence of the spring gun would be no defense, unless it were brought home to the deceased in such a manner that her act in opening the trunk was a deliberate attempt on her part to take her own life, but that, if defendant warned the only person who had a lawful right to enter his room, such warning would have a material bearing on the question of malice. State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, 15 Ann. Cas. 584. On the question of notice this case does not go so far as a dictum in U. S. v. Gilliam, Fed. Cas. No. 15,205a, where it was said: "Where notice is given, the sufferer is held to have brought the calamity upon himself—to be his own executioner if life is lost, and to have himself pulled the trigger."

Defense of Others

We have seen that the right and duty to prevent a felony are not limited to the person upon whom it is attempted, but extend to every person who is in a position to prevent it. The principle of justification is broader than the mere idea of self-defense.[87] The right of third persons to interfere is not, however, limited to cases of attempted felony. Bystanders may interfere to prevent an assault or a larceny, or any other crime. The members of a family may protect and defend each other,[88] and a man's guests or neighbors may interfere to resist an attack on his house.[89] The rule as generally expressed is that one may do for another whatever another may do for himself,[90] though there are cases casting some doubt on the rule so broadly stated. The right to defend another is said to be no greater than the latter's right to defend himself.[91]

[87] Defense of justice of the United States Supreme Court by a United States marshal. In re Neagle (C. C.) 39 Fed. 833, 5 L. R. A. 78; Id., 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. Rescue of friend from kidnappers. Com. v. Delaney (Ky.) 29 S. W. 616.

[88] 4 Bl. Comm. 186; Rex v. Harrington, 10 Cox, Cr. Cas. 370; Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; Crowder v. State, 8 Lea (Tenn.) 669; Pond v. People, 8 Mich. 150; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Sharp v. State, 19 Ohio 379; Com. v. Malone, 114 Mass. 295; State v. Bullock, 91 N. C. 614; Smurr v. State, 105 Ind. 125, 4 N. E. 445; State v. Westfall, 49 Iowa, 328; State v. Brittain, 89 N. C. 481; Staten v. State, 30 Miss. 619; Saylor v. Com., 97 Ky. 184, 30 S. W. 390 (attempt by force and threats to abduct wife.) A husband has the legal right to the company and custody of his wife and child, and may defend such custody by force, if necessary, against the wife's father to prevent the latter taking them from him. Cole v. State, 45 Tex. Cr. R. 225, 75 S. W. 527.

[89] Cooper's Case, Cro. Car. 544; Semayne's Case, 5 Coke, 91; Pond v. People, 8 Mich. 150.

[90] 1 Bish. New Cr. Law, § 877; Stanley v. Com., 86 Ky. 440, 6 S. W. 155, 19 Am. St. Rep. 305.

[91] Son's right to kill another in defense of his father is no greater than the father's right to kill in self-defense under the same circum-

EXCUSABLE HOMICIDE IN GENERAL

66. Excusable homicide may be either:
(a) Accidental, or
(b) In self-defense, on a sudden affray.

ACCIDENT

67. Excusable homicide by accident is where the killing is the result of an accident or misfortune in doing a lawful act in a lawful manner.[93]

stances. Morris v. State (Ala.) 39 South. 608. In Guffee v. State, 8 Tex. App. 187, the trial court charged: "When one person interferes on behalf of another, he becomes responsible for the acts of the person in whose behalf he interferes; and if the acts and circumstances would not justify the killing by the person in whose behalf he interferes, neither will the law justify him in taking life in behalf of such person." The appellate court said: "The inherent vice of this extract from the charge of the court is that it bound appellant to his brother with hooks of steel, and made him answerable for the acts of his brother, as well as for his own, without regard to the motive or intent which may have been totally dissimilar in the breast of each. Throughout the transaction John Guffee may have been actuated by a malicious motive, * * * while the intent of appellant may have been of a wholly different nature and character. Can it be said that in that event the same degree of culpability must attach to him as if his purpose had been the same as that of his brother? If so, one of the fundamental principles of criminal jurisprudence must be ignored and set at naught. If my brother seeks out his enemy on the public highway with a view to slay him, and I, ignorant of his design as well as the cause of the difficulty and how it originated, but seeing him hotly engaged and the fortune of the fight turning against him, and realizing that he is in imminent danger of life or limb, rush to his rescue, and strike down his antagonist in order to save his life, must I, under such circumstances, be adjudged guilty of murder with express malice, merely because my brother would be so adjudged in case he had inflicted the mortal blow? If the law is so written in the books, we have failed to discover it."

[93] 4 Bl. Comm. 182.

To excuse a homicide on the ground of accident, the accused must have been engaged in a lawful act, and he must have been performing it with due care.[93] If he was engaged in an unlawful act, malum in se, or if the accident was the result of culpable negligence, he is criminally liable for the consequences.[94] It is a lawful act for a parent to chastise his child, and he is not liable if death results to the child if the punishment was moderate. If, however, he uses an instrument likely to cause serious injury, or inflicts punishment to an immoderate extent, he is criminally liable.[95] If a workman on a building throws material therefrom, and it kills a passer-by, the homicide is excusable if persons were not in the habit of passing, and there was no reason to suppose that they would pass. It would be otherwise, though, if he knew that people were passing, or it was likely that they were passing.[96] So also, if a person accidentally kills another in mutual combat, where he is voluntarily fighting, he is guilty of manslaughter, as the fighting is an unlawful act; but if he does not wish to fight, and is merely defending himself, as the law permits him to do, he is excused, on the ground of accident.[97] And if two persons engage in a friendly wrestling match, without unlawful violence, and one is thrown, and chances to fall in such a way that he is killed, or in such a way as to

[93] State v. Benham, 23 Iowa, 154, 92 Am. Dec. 416; People v. Lyons, 110 N. Y. 618, 17 N. E. 391. The killing of a person by the accidental discharge of a pistol by one engaged in no unlawful act, and without negligence, is homicide by misadventure. U. S. v. Meagher (C. C.) 37 Fed. 875.

[94] Post, p. 229 et seq.

[95] Fost. Crown Law, 262; 4 Bl. Comm. 182; 1 Hale, P. C. 473, 474; Reg. v. Griffin, 11 Cox, Cr. Cas. 402. Post, p. 231, footnotes 34, 35; page 270.

[96] Post, p. 232. [97] Reg. v. Knock, 14 Cox, Cr. Cas. 1.

knock down a bystander, who is killed, the killing, being accidental, is excusable.[98] If a man shoots at a person, and accidentally kills a bystander, he will be in the same position as if he had killed the person intended. The killing will be murder, manslaughter, justifiable, or excusable, according as it would have been one or the other if the person intended had been killed.[99] But to render one liable for an accident in the doing of an unlawful act, the act must be malum in se, and not merely malum prohibitum, and, therefore, a person is not criminally liable for running over a person while driving at a speed prohibited by a city ordinance, but not recklessly, since the excessive speed is only wrong because of the ordinance.[1]

EXCUSABLE SELF-DEFENSE

68. Excusable homicide in self-defense is where a person from necessity kills another upon a sudden affray, to save himself from death or serious bodily harm.

(a) The danger must reasonably appear to be imminent.

(b) The person taking life must believe the danger to be imminent.

(c) He must have retreated as far as safety would allow, except that

EXCEPTION—A man is not bound to retreat when attacked in his own habitation.

[98] Reg. v. Bruce, 2 Cox, Cr. Cas. 262.

[99] Agnes Gore's Case, 9 Coke, 81; Saunders' Case, 2 Plowd. 473; Plummer v. State, 4 Tex. App. 310, 30 Am. Rep. 165; Pinder v. State, 27 Fla. 370, 8 South. 837, 26 Am. St. Rep. 75. See, also, post, pp. 206, 212, note 55.

[1] COM. v. ADAMS, 114 Mass. 323, 19 Am. Rep. 362, Mikell Illus. Cas. Criminal Law, 30.

(d) He must not have been the aggressor, and provoked the difficulty himself, except that

EXCEPTIONS—(1) A few courts seem to hold that this does not apply unless he had a felonious intent.

(2) His acts must have been calculated and intended to provoke a difficulty.

(3) If, after provoking the difficulty, he withdraws in good faith, and his adversary follows, he is no longer the aggressor, and may defend himself.

In explaining justifiable homicide, we have already shown the difference between justifiable and excusable self-defense. It will be remembered that they are alike dispunishable. We saw that in justifiable self-defense no fault whatever attaches to the person committing the homicide; as, for instance, where the killing is of one who is making an unprovoked murderous assault, or attempting any other forcible felony. Excusable homicide in self-defense is where the person committing it is regarded by the law as being to some extent to blame; as, for instance, where he resists an attack on his person or property not made with felonious intent, so as to give him the right to take his assailant's life, and thereby becomes involved in a combat or sudden affray. Where, after the difficulty has begun, the other party attempts to take his life, or inflict grievous bodily harm, he will be excused if he kills him as a necessary means of saving his own life. He is regarded as having been to some extent in fault in resisting the nonfelonious attack, instead of seeking redress and protection at the hand of the law, and is therefore merely excusable, instead of being regarded as justified. Where an assault is not made in such a way as to threaten death or grievous

bodily harm, or where a mere trespass upon property is attempted, or an unlawful arrest sought to be made, the person whose rights are thus assailed may repel force by force; but, as we have seen, he cannot go to the extreme of taking the aggressor's life, or using a deadly instrument in his defense, unless his life is in imminent danger at the hands of the aggressor, or unless grievous bodily harm is imminent. If his life or grievous bodily harm is threatened, and he can apparently prevent it only by taking his assailant's life, he will be excused for the homicide.[2] No other danger than of death or grievous bodily harm will excuse him. In the absence of a statute, a man is not even excused where he kills another while the latter is in the act of adultery with his wife; he will be guilty of manslaughter at least.[3]

Imminence of Danger and Necessity

Before self-defense can be available as an excuse, it must appear that the danger was imminent, and that the only apparently possible way in which to escape death or grievous bodily harm was to kill the assailant.[4] The danger must be imminent, impending, and present, and not prospective, or even in the near future.[5]

When it is said that the danger must be imminent, it must be remembered that the doctrine of mistake of fact applies

[2] Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; White v. Washington Territory, 3 Wash. T. 397, 19 Pac. 37.

[3] Hooks v. State, 99 Ala. 166, 13 South. 767. See ante, p. 179, note 45; post, p. 224.

[4] State v. Decklotts, 19 Iowa, 447; Meurer v. State, 129 Ind. 587, 29 N. E. 392; Greschia v. People, 53 Ill. 295. Cannot infer danger from ill will of adversary in prior contests, State v. Sullivan, 51 Iowa, 142, 50 N. W. 572.

[5] Dolan v. State, 81 Ala. 11, 1 South. 707; State v. Jump, 90 Mo. 171, 2 S. W. 279; Burgess v. Territory, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

here as elsewhere in the criminal law. That doctrine is that, if one would have been justified or excused in doing an act if the facts had actually been as he thought they were, then he is excused for doing such act if he had reasonable grounds to believe and did believe that the facts were as he thought them, and he used reasonable efforts to ascertain the facts.

If to the accused there was a reasonably apparent necessity to kill to save himself, he will be excused, though to some one else there might not have seemed to be any such necessity, and though in fact there was no such necessity.[6] Most of the cases are to the effect that the circumstances must have been such as to excite the fears of a reasonable

[6] State v. Collins, 32 Iowa, 36; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; People v. Morine, 61 Cal. 367; State v. Matthews, 78 N. C. 523; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; State v. Shippey, 10 Minn. 223 (Gil. 178) 88 Am. Dec. 70; Steinmeyer v. People, 95 Ill. 383; Stanley v. Com., 86 Ky. 440, 6 S. W. 155, 9 Am. St. Rep. 305; Patillo v. State, 22 Tex. App. 586, 3 S. W. 766; State v. Eaton, 75 Mo. 586; People v. Gonzales, 71 Cal. 569, 12 Pac. 783; Patterson v. People, 46 Barb. (N. Y.) 625; Radford v. Com. (Ky.) 5 S. W. 343; Oder v. Com., 80 Ky. 32; Oakley v. Com. (Ky.) 11 S. W. 72; Bang v. State, 60 Miss. 571; State v. Donahoe, 78 Iowa, 486, 43 N. W. 297; People v. Williams, 32 Cal. 280; Barnards v. State, 88 Tenn. 183, 12 S. W. 431, at page 442; Smith v. State, 25 Fla. 517, 6 South. 482; Pinder v. State, 27 Fla. 370, 8 South. 837, 26 Am. St. Rep. 75; Brown v. Com., 86 Va. 466, 10 S. E. 745; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Murray v. Com., 79 Pa. 311; Pistorius v. Com., 84 Pa. 158; Stoneman v. Com., 25 Grat. (Va.) 887; Abernethy v. Com., 101 Pa. 322; Schnier v. People, 23 Ill. 17; Cahill v. People, 106 Ill. 621; Barr v. State, 45 Neb. 458, 63 N. W. 856; Enright v. People, 155 Ill. 32, 39 N. E. 561; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528. A homicide is justifiable where the circumstances are such as to induce a reasonably cautious man to believe that the killing was necessary to save his own life or protect him from great personal injury, though in fact an actual necessity to kill did not exist. Lane v. State, 44 Fla. 105, 32 South. 896; Fantroy v. State, 166 Ala. 27, 51 South. 931.

man, and that the accused must have acted as an ordinarily cautious and courageous man would have acted; or, in other words, there must have been a reasonable appearance of danger, or reasonable grounds to believe there was danger.[7] But the court and jury must look at the circumstances from the standpoint of the accused. A coward will fear danger unreasonably, and the mere fear of a coward, without reason therefor, is not enough.[8] A person must not be guilty of negligence in coming to the conclusion that he is in danger. Under such circumstances, the homicide will be manslaughter.[9] If a deadly weapon is presented or attempted to be presented, whether there is any intention to use it or not, and though it may not be loaded, the person so threatened may reasonably assume that there is an intent to use it, and may act on the assumption;[10] but a person cannot repel the attack of an unarmed man, not his superior in physical power, by killing him, and then successfully set up the plea of self-defense;[11] nor can he kill an assailant who has turned away, and manifested an intention to aban-

[7] Creek v. State, 24 Ind. 151; State v. Crawford, 66 Iowa, 318, 23 N. W. 684; Kendrick v. State, 55 Miss. 436; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; People v. Austin, 1 Parker, Cr. R. (N. Y.) 154, at page 164; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; Field v. Com., 89 Va. 690, 16 S. E. 865; Askew v. State, 94 Ala. 4, 10 South. 657, 33 Am. St. Rep. 83; State v. Parker, 106 Mo. 217, 17 S. W. 180; State v. Morey, 25 Or. 241, 35 Pac. 655, 36 Pac. 573; People v. Lynch, 101 Cal. 229, 35 Pac. 860; State v. Symmes, 40 S. C. 383, 19 S. E. 16; Amos v. Com. (Ky.) 28 S. W. 152. And see cases cited in preceding note.

[8] Golden v. State, 25 Ga. 527, at page 533; Gallery v. State, 92 Ga. 463, 17 S. E. 863. But see Grainger v. State, 5 Yerg. (Tenn.) 459, 26 Am. Dec. 278.

[9] U. S. v. Heath (D. C.) 19 Wash. Law Rep. 818.

[10] People v. Anderson, 44 Cal. 65. But see State v. Bodie, 33 S. C. 117, 11 S. E. 624.

[11] Hall v. State (Miss.) 1 South. 351.

don the conflict.[12] In all cases there must be an actual bona fide belief in danger. If a person kills an assailant when he does not believe he is in danger of death or grievous bodily harm, it has been held that he will not be excused because it afterwards appears that there was such danger.[13] There can be no such thing as accidental self-defense.[14]

Duty to Retreat and Avoid Danger

The law in regard to self-defense on a sudden affray does not consider the wounded pride which may result from declining to fight, or the sense of shame a man may feel in being denounced as a coward,[15] but requires that, to bring a homicide within the excuse of self-defense, the accused must show that he endeavored to avoid any further struggle, and retreated.[16] He must have retreated if there was a way of escape open to him, and have done all in his power to avert the necessity of killing his adversary. The law, however, only requires a man to retreat when he can safely do so. He is not bound to retreat if to do so would probably render him liable to death or grievous bodily harm be-

[12] Meurer v. State, 129 Ind. 587, 29 N. E. 392; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286.

[13] People v. Gonzales, 71 Cal. 569, 12 Pac. 783; Trogdon v. State, 133 Ind. 1, 32 N. E. 725; State v. Jackson, 32 S. C. 27, 10 S. E. 769.

[14] State v. Smith, 114 Mo. 406, 21 S. W. 827.

[15] Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85.

[16] Duncan v. State, 49 Ark. 543, 6 S. W. 164; People v. Cole, 4 Parker, Cr. R. (N. Y.) 35; STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125; Squire v. State, 87 Ala. 114, 6 South. 303; Carter v. State, 82 Ala. 13, 2 South. 766; Com. v. Ware, 137 Pa. 465, 20 Atl. 806; Sullivan v. State, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22; State v. Jones, 89 Iowa, 182, 56 N. W. 427; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528; People v. Constantino, 153 N. Y. 24, 47 N. E. 37. Retreat is not necessary under the Texas statute. Williams v. State, 30 Tex. App. 429, 17 S. W. 1071.

cause of the fierceness of his assailant's attack.[17] The mere fact that retreat will not place him in less peril, or on better vantage ground than before, does not excuse him from the performance of this duty.[18] As has already been said, one who is assaulted in his own house is not bound to retreat, but may stand his ground.[19]

Accused as the Aggressor

Self-defense is no excuse for a homicide if the accused brought on the difficulty, and was himself the aggressor.[20] If, however, after bringing on the difficulty, a person in good faith withdraws, and shows his adversary that he does not desire to continue the conflict, and his adversary pursues him, he has the same right to defend himself as if he had

[17] State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; Creek v. State, 24 Ind. 151; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52; State v. Donnelly, 69 Iowa, 705, 27 N. W. 369, 58 Am. Rep. 234; People v. Macard, 73 Mich. 15, 40 N. W. 784; Duncan v. State, 49 Ark. 543, 6 S. W. 164; State v. Sorenson, 32 Minn. 118, 19 N. W. 738; State v. Rheams, 34 Minn. 18, 24 N. W. 302.

[18] Carter v. State, 82 Ala. 13, 2 South. 766.

[19] Ante, p. 186, note 77.

[20] 1 Hale, P. C. 482; Stewart v. State, 1 Ohio St. 66; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; State v. Lane, 26 N. C. 113; State v. Scott, 41 Minn. 365, 43 N. W. 62; People v. Robertson, 67 Cal. 646, 8 Pac. 600; Helm v. State, 67 Miss. 562, 7 South. 487; Allen v. State, 66 Miss. 385, 6 South. 242; Clifford v. State, 58 Wis. 477, 17 N. W. 304; Hasson v. Com. (Ky.) 11 S. W. 286; State v. Neeley, 20 Iowa, 108; State v. Murdy, 81 Iowa, 603, 47 N. W. 867; State v. Jump, 90 Mo. 171, 2 S. W. 279; Thompson v. State (Miss.) 9 South. 298; Atkins v. State, 16 Ark. 568; Gaines v. Com., 88 Va. 682, 14 S. E. 375; Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; State v. Hawkins, 18 Or. 476, 23 Pac. 475; State v. Brittain, 89 N. C. 481; Kinney v. People, 108 Ill. 519; Fussell v. State, 94 Ga. 78, 19 S. E. 891. Arming oneself in anticipation of a difficulty, if done for purposes of defense and not of aggression, does not deprive one of the right to invoke the defense of self-defense. Lett v. State, 1 Ala. App. 18, 56 South. 5; Radford v. Com. (Ky.) 5 S. W. 343.

not originally provoked the difficulty,[21] but the withdrawal must be in good faith, and must not be for the purpose of securing an advantage in the fight.[22] If he withdraws, and gives his adversary reasonable ground for believing that he has withdrawn, it is sufficient.[23] It is not required of him that he at all hazards make it actually known to his antagonist that he has withdrawn; if his acts are such as would notify a reasonable man under the circumstances of the withdrawal, it is all that is required of him. If the passion or cowardice of the adversary blind him to the actions of the accused showing his intention to withdraw, this cannot be charged against the accused, so as to deprive him of the right secured by his withdrawal to defend his life.[24] "If the party assailed has eyes to see he must see, and if he has ears to hear he must hear. He has no right to close his eyes or deaden his ears."[25] If, however, the party assailed was deprived by the nature or violence of the original attack by the accused of the ability of a reasonable man to perceive the withdrawal of the accused, the accused must

[21] STOREY v. STATE, 71 Ala. 330, Mikell Illus. Cas. Criminal Law, 103; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; Hittner v. State, 19 Ind. 48; Parker v. State, 88 Ala. 4, 7 South. 98; STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125; Brazzil v. State, 28 Tex. App. 584, 13 S. W. 1006; Oakley v. Com. (Ky.) 11 S. W. 72; Hash v. Com., 88 Va. 172, 13 S. E. 398; Barnard v. Com. (Ky.) 8 S. W. 444; Crane v. Com. (Ky.) 13 S. W. 1079; State v. Thompson, 45 La. Ann. 969, 13 South. 392; Wills v. State (Tex. Cr. App.) 22 S. W. 969; Johnson v. State, 58 Ark. 57, 23 S. W. 7; Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547.

[22] 1 Hale, P. C. 479, 480; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; Parker v. State, 88 Ala. 4, 7 South. 98; People v. Wong Ah Teak, 63 Cal. 544.

[23] State v. Dillon, 74 Iowa, 653, 38 N. W. 525.

[24] PEOPLE v. BUTTON, 106 Cal. 628, 39 Pac. 1073, 28 L. R. A. 591, 46 Am. St. Rep. 259, Mikell Illus. Cas. Criminal Law, 116.

[25] PEOPLE v. BUTTON, 106 Cal. 628, 39 Pac. 1073, 28 L. R. A. 591, 46 Am. St. Rep. 259, Mikell Illus. Cas. Criminal Law, 116.

at his peril bring home to the assailed the knowledge of his intention to withdraw from the fight.[26]

The authorities are not in accord on the question whether the right of self-defense revives on the part of one who has assaulted another with malice and then has withdrawn from the encounter before killing to save his life. All agree that if the withdrawal were only colorable and the killing were done in pursuance of the original malice the killing is not excusable. But when the killing was admittedly done solely to preserve life and not in pursuance of an original malicious design, some of the authorities hold that the killing is not excusable if the accused attacked the deceased with felonious design, or maliciously. As said by Gaston, J.:[27] "If the first assault was made with this purpose [to kill deceased or to do him great bodily harm], the malice of that assault, notwithstanding the violence with which it was returned by the deceased, communicates its character to the last act of the prisoner. It is laid down as settled law that if a man assault another with malice prepense, even though he should be driven to the wall, and kill him there to save his own life, he is yet guilty of murder in respect of his first intent."

On the other hand, it is held in other jurisdictions that there is always a place for repentence, and that, though the attack may have been made originally with malicious intent, if this intent was abandoned and the accused bona fide retreated and sought to evade the necessity for killing, his right of self-defense revives.[28]

[26] PEOPLE v. BUTTON, 106 Cal. 628, 39 Pac. 1073, 28 L. R. A. 591, 46 Am. St. Rep. 259, Mikell Illus. Cas. Criminal Law, 116.

[27] In STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125. See, also, Hash v. Com., 88 Va. 172, 13 S. E. 398.

[28] Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470. In this case Ranney, J., said: "When this is made to appear [that accused bona

Where the accused brings on the difficulty, he must in all cases retreat before killing in order to make the killing excusable homicide. If he continues in the fight after being himself the aggressor, whether he brought on the difficulty with felonious intent, or some less culpable intent, he is guilty of some degree of felonious homicide. It is generally held that, if the intent of the accused in bringing on the difficulty was felonious, the subsequent killing is murder; if not felonious, manslaughter.[39]

fide retreated and notified deceased of his withdrawal], we know of no principle, however criminal the previous conduct of the accused may have been, which allows him to be hunted down and his life put in jeopardy, and denies him the right to act upon that instinct of self-preservation which spontaneously arises alike in the bosoms of the just and the unjust."

[39] State v. Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; State v. Parker, 96 Mo. 382, 9 S. W. 728; State v. McDaniel, 94 Mo. 301, 7 S. W. 634; State v. Parker, 106 Mo. 217, 17 S. W. 180; Nash v. Com., 88 Va. 172, 13 S. E. 398; Polk v. State, 30 Tex. App. 657, 18 S. W. 466; Sullivan v. State, 31 Tex. Cr. R. 486, 20 S. W. 927, 37 Am. St. Rep. 826. In State v. Hunter, 82 S. C. 153, 63 S. E. 685, the court said: "If a man picks a quarrel with his fellow and kills his fellow, the law denies him the plea of self-defense. If the defendant used language toward the deceased that a reasonable man would expect to bring on a fight, then the law denies him the plea of self-defense." See, also, Baldwin v. State, 111 Ala. 11, 20 South. 528. This doctrine is denied in Smith v. State, 8 Lea (Tenn.) 402, and State v. Culler, 82 Mo. 623. In the case last cited the court said: "Were it the rule (as held in State v. Hunter, supra), then a person who, without any ulterior or malicious purpose, should, on the street, begin some sudden wrangle, altercation, or dispute, * * * the party assailed, either with tongue or fist, could draw a deadly weapon and take his life, and he be defenseless before his adversary, or a murderer if he successfully resisted the murderous assault. * * * It is only when the wordy quarrel or the actual nonfelonious combat is provoked by the commencer or aggressor, in order to afford opportunity for him to kill his adversary, that the right of self-defense ceases." State v. Gilmore, 95 Mo. 554, 8 S. W. 359, 912; State v. Hardy, 95 Mo. 455, 8 S. W. 416; State v. Davidson, 95 Mo. 155, 8 S. W. 413.

A person may be the aggressor, in the eye of the law, by doing wrongful acts provoking another to attack him.[80] Some courts hold that a man who is caught in adultery with another's wife is so far the aggressor that he cannot defend himself against an attack by the husband, and, after killing him, set up the plea of self-defense; he will be guilty of manslaughter at least.[81] A man will not be deemed the aggressor, within this rule, merely because his acts provoked the difficulty, unless they were calculated or intended to have that effect.[82] It follows from what has already been said that where the original aggressor ceases the attack, and shows that he has abandoned it, and the person assailed renews the difficulty, he becomes in turn the aggressor, and

[80] One who provokes an attack by the use of abusive language cannot justify the use of violence on the ground of self-defense. Shaw v. State (Tex. Cr. App.) 73 S. W. 1046. If the defendant is at fault in striking the horse of the deceased with a whip, and thereby brings on the difficulty, he cannot avail himself of the plea of self-defense. Rose v. State, 144 Ala. 114, 42 South. 21. It has been held in a recent case that if defendant went armed to a certain place, knowing deceased to be there and that he would be likely to attack defendant, the latter could not avail himself of the defense that he killed deceased in self-defense. Valentine v. State, 108 Ark. 594, 159 S. W. 26. But see Nash v. State, 73 Ark. 399, 84 S. W. 497.

[81] Reed v. State, 11 Tex. App. 509, 40 Am. Rep. 795; Drysdale v. State, 83 Ga. 744, 10 S. E. 358, 6 L. R. A. 424, 20 Am. St. Rep. 340. It is otherwise where the circumstances are such that the husband has no right to attack the adulterer. Wilkerson v. State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63. A man may defend himself against an attack by the father of a girl with whom he has been having intercourse with her consent. Varnell v. State, 26 Tex. App. 56, 9 S. W. 65. A person who goes to another's house merely to secure a place to sleep, and, not finding the husband, lies down, by permission of the wife, in an adjoining room until 2 o'clock in the morning, when the husband returns, and attacks him, may defend himself. Franklin v. State, 30 Tex. App. 628, 18 S. W. 468.

[82] White v. State, 23 Tex. App. 154, 3 S. W. 710; Johnson v. State, 26 Tex. App. 631, 10 S. W. 235; Saens v. State (Tex. Cr. App.) 20 S. W. 737.

cannot plead self-defense if he kills the original aggressor to save his life.[33]

Defense of Person in Family Relation

The killing of a person in defense of those standing in the relation of husband and wife, parent and child, master and servant, or guest and host, is regarded in law as the act of the person defended, and is excused to the same extent as if in fact committed by him.[34] Some of the cases even go so far as to say that any person can defend another, whether he is bound to protect him or not,—that whatever a person may do for himself he may do for another.[35] It is said that the right to defend another, however, can be no greater than the right of the other to defend himself;[36] so that if a person brings on a difficulty, so that he could not, if he killed his opponent, set up the plea of self-defense, his brother, if he kills him, cannot set up the plea.[37]

FELONIOUS HOMICIDE IN GENERAL

69. Felonious homicide is the killing of a human being without justification or excuse, and may be

(a) Murder, or

(b) Manslaughter.

[33] Allen v. State, 24 Tex. App. 216, 6 S. W. 187.

[34] Reg. v. Rose, 15 Cox, Cr. Cas. 540; Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; Chittenden v. Com. (Ky.) 9 S. W. 386; Pond v. People, 8 Mich. 150; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Hathaway v. State, 32 Fla. 56, 13 South. 592. See, also, ante, p. 191; Tapscott v. Com., 140 Ky. 573, 131 S. W. 487.

[35] Ante, p. 191.

[36] A parent has no right to protect a child in the commission of a crime. State v. Herdina, 25 Minn. 161.

[37] State v. Melton, 102 Mo. 683, 15 S. W. 139; Saens v. State (Tex.

MURDER

70. Murder at common law is unlawful homicide with malice aforethought.[88]

MALICE AFORETHOUGHT

71. Malice aforethought may exist whether the act is premeditated, or unpremeditated. It is present when a felonious homicide has been committed with:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of sudden passion, caused by adequate provocation, as hereafter explained).

(b) Knowledge that the act or omission which causes the death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) When the homicide has been committed in the commission of or the attempt to commit a felony.

(d) When the homicide was committed in resisting a lawful arrest, or in obstructing a lawful prevention of a riot or affray, whether the killing were intentional or not, provided the offender had notice

Cr. App.) 20 S. W. 737; State v. Brittain, 89 N. C. 482. And see Jones v. Fortune, 128 Ill. 518, 21 N. E. 523.

[88] Steph. Dig. Cr. Law, art. 223. See 4 Bl. Comm. 194.

that the person he was obstructing was lawfully authorized to make the arrest or suppress the riot or affray.[39]

72. Murder is a felony at common law, and was punishable by death.

Malice Aforethought [40]

To constitute the crime of murder, the killing must be with "malice aforethought." Where malice aforethought exists, every homicide is murder.[41] "Malice" does not necessarily mean hatred or personal ill will towards the person killed, nor an actual intent to take his life, or even to take any one's life. If the killing was for the purpose of robbery, without any hatred or ill will against the person killed; or if the killing of the person was done in an attempt to kill another, it is said to be done of malice aforethought. The killing may be unintentional, and done in the commission of some other crime, or while merely doing a reckless and dangerous act; and in either case the person causing the death may have what the law deems "malice aforethought." It is impossible to give a satisfactory definition of the term. Thus it has been said: "The words 'malice aforethought' long ago acquired in law a settled meaning, somewhat different from the popular one. In their legal sense they do not import an actual intention to kill the deceased. The idea is not spite or malevolence to the deceased in particular, but evil design in general; the dictate of a wicked, depraved, and malignant heart; not premeditated personal hatred or revenge towards the per-

[39] Following Steph. Dig. Cr. Law, art. 223.

[40] See Early History of Malice Aforethought, by F. W. Maitland, 8 Law Mag. & Rev. 406.

[41] State v. Spangler, 40 Iowa, 365; Murphy v. State, 81 Ind. 511; People v. Crowey, 56 Cal. 36; McMillan v. State, 35 Ga. 54.

son killed, but that kind of unlawful purpose which, if persevered in, must produce mischief." [43] Such general expressions obviously afford little practical guidance. Again, malice is frequently divided into express malice and implied malice, but the distinction is of little value, and is often misleading. It was described in the old form of indictment for murder as "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil." [44] The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.[44] In short, the words "malice aforethought" are technical, and must be interpreted in the light of a long series of decided cases, which have given them an artificial meaning.[45] Malice

[43] State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Davidson v. State, 135 Ind. 254, 34 N. E. 972; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Wellar v. People, 30 Mich. 16; Nye v. People, 35 Mich. 16; Ellis v. State, 30 Tex. App. 601, 18 S. W. 139; Com. v. Drum, 58 Pa. 9; McClain v. Com., 110 Pa. 263, 1 Atl. 45; Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698; State v. Decklotts, 19 Iowa, 447.

[44] See Steph. Dig. Cr. Law, Append. note xiv.; 2 Bish. New Cr. Law, § 675.

[44] Reg. v. Doherty, 16 Cox, Cr. Cas. 306; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; People v. Clark, 7 N. Y. 385; People v. Williams, 43 Cal. 344; State v. Anderson, 2 Overt. (Tenn.) 6, 5 Am. Dec. 648; Nye v. People, 35 Mich. 16; Cook v. State, 77 Ga. 96; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; Mitchum v. State, 11 Ga. 615; State v. Dennison, 44 La. Ann. 135, 10 South. 599; State v. Ashley, 45 La. Ann. 1036, 13 South. 738; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528.

[45] The term "is a mere popular phrase unluckily introduced into an act of Parliament, and half explained away by the judges. It throws no light whatever upon the crime of murder, and never was used in the natural sense of premeditation. On the other hand, it served as a sort of standing hint, for it was equivalent to saying

aforethought exists in any of the circumstances enumerated in the black-letter text, and any definition broad enough to cover them all would be vague and unsatisfactory.

Intention to Cause Death or Serious Bodily Harm

There can be no greater exhibition of malice than a deliberate intent to cause the death of another. Therefore a death intentionally caused is murder if it is not justifiable or excusable, or committed under such palliating circumstances as reduce it to manslaughter.[46] But the law goes further and holds that not only is malice present when there is an intention to kill, but that it is also present when the act resulting in death was done without an intent to kill, but with an intent to do serious bodily harm. The act is done in such a case without "the fear of God before his eyes"; it is "instigated by the devil"; it shows "a heart regardless of social duty"—in other words, with "malice aforethought." Thus, where a man knocked down another and continued to strike him down every time he attempted to rise. Said the court. "His acts were voluntary, wanton, deliberate, and cruel, to a poor weak man; they are symptoms of a froward mind, of a wicked, depraved, and malig-

that there were two kinds of homicide—homicide with premeditation, or other circumstances indicating the same sort of malignity; and homicide provoked by a sudden quarrel, or accompanied by circumstances indicative of a less degree of malignity." Steph. Dig. Cr. Law, Append. note xiv. See, also, REG. v. SERNÉ, 16 Cox, Cr. Cas. 311, Mikell Illus. Cas. Criminal Law, 122. Reduced to its lowest terms, malice in murder means a knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled, perhaps, with an implied negation of any excuse or justification." Holmes, C. J., in Com. v. Chance, 174 Mass. 252, 54 N. E. 554, 75 Am. St. Rep. 306.

[46] Post, "Manslaughter."

nant spirit; the plain indications of a heart regardless of social duty and fatally bent upon mischief; they therefore manifest malice aforethought; and this killing was murder." [47]

This doctrine is often expressed as a rule of evidence. It is then assumed that an intent to kill is necessary to constitute malice, and it is said that a man is presumed to intend his voluntary acts and their natural and ordinary consequences. If a man strikes another with a deadly weapon,[48] or inflicts grievous bodily injury upon him, or does any act which is likely to cause death,[49] and death results, he is presumed to have intended to kill him. On the other hand, if the act, although unlawful, is not one likely to cause death,—as in the case of a blow with a small stick by one who does not intend to kill or cause grievous bodily harm, and death unexpectedly results—the crime is not murder, but merely manslaughter.[50]

[47] PENNSYLVANIA v. HONEYMAN, Add. (Pa.) 147, Mikell Illus. Cas. Criminal Law, 119.

[48] Grey's Case, J. Kelyng, 64; Com. v. York, 9 Metc. (Mass.) 103, 43 Am. Dec. 373; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Rainsbarger, 71 Iowa, 746, 31 N. W. 865; State v. Thomas, 98 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351; McKee v. State, 82 Ala. 32, 2 South. 451; Territory v. Hart, 7 Mont. 489, 17 Pac. 718; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; Clem v. State, 31 Ind. 480; Murphy v. State, Id. 511; State v. Christian, 66 Mo. 138; Evans v. State, 44 Miss. 762.

[49] Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Wellar v. People, 30 Mich. 16; REG. v. SERNÉ, 16 Cox, Cr. Cas. 311, Mikell Illus. Cas. Criminal Law, 122. Willful exposure of person to weather. Territory v. Manton, 8 Mont. 95, 19 Pac. 387. Willfully withholding food from child with determination to cause death. Reg. v. Conde, 10 Cox, Cr. Cas. 547.

[50] Post, p. 229.

Knowledge that Act will Probably Cause Death or Injury

The same principle applies to cases where a person does an act with knowledge that it will probably cause death or grievous bodily harm to some person, although he has no actual intention to injure any person, and may wish the contrary. Thus, if a man recklessly throws from the roof into a crowded street a heavy piece of timber, which kills a person in the street, he is guilty of murder. So, if a person intentionally fires a pistol in a crowded street, and kills another, this is murder.[51] So, where a man violently threw a heavy beer glass towards his wife, breaking a lighted lamp carried by her, and scattering ignited oil over her clothes, and causing her death, the evidence of malice was sufficient to constitute the act murder. "It was utterly immaterial," said the court, "whether the plaintiff in error intended the glass should strike his wife, his mother-in-law, or his child, or whether he had any specific intent, but acted solely from general malicious recklessness, disregarding any and all consequences." [52]

When it is said that malice is present when an act is done with knowledge that it will probably cause death or serious bodily harm, it is not meant that there must be actual knowledge, it is sufficient if a reasonable man under the circumstances would have known that such would be the natural and probable result of the act.

Intent to Commit Felony

As we have seen, where a man does a criminal act, while actually intending to do another criminal act, he is, as a rule, criminally liable for the former act, the actual criminal

[51] Pool v. State, 87 Ga. 526, 13 S. E. 556; Holt v. State, 89 Ga. 816, 15 S. E. 816; Brown v. Com. (Ky.) 17 S. W. 220; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493.

[52] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698.

intent concurring with the act done being enough to make that act a crime.[53] This rule of constructive intent applies to murder, provided the intended crime is a felony. If, however, the intended crime is merely a misdemeanor, and the wrongdoer unintentionally causes some person's death, the homicide is only manslaughter.[54] Thus, if a man shoots at another with the intention of killing him, and kills a bystander, he is guilty of the murder of the person killed.[55] The same principle applies where a person lays poison for one man, and another drinks it and dies.[56] It is murder if a robber accidentally kills his victim, or if a person commits arson by setting fire to a dwelling house, and accidentally burns the occupant.[57] So, where suicide is a felony, a person who attempts to commit suicide and accidentally kills one who is trying to prevent the deed commits murder.[58] Abortion is only a misdemeanor at common law,

[53] Ante, p. 56. [54] Post, p. 229.

[55] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; State v. Gilmore, 95 Mo. 554, 8 S. W. 359, 912; Angell v. State, 36 Tex. 542; 14 Am. Rep. 380; State v. Renfrow, 111 Mo. 589, 20 S. W. 299; Jennings v. Com. (Ky.) 16 S. W. 348; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493.

[56] Gore's Case, 9 Coke, 81a; Saunders' Case, 2 Plowd. 473; Johnson v. State, 92 Ga. 36, 17 S. E. 974.

[57] REG. v. SERNÉ, 16 Cox, Cr. Cas. 311, Mikell Illus. Cas. Criminal Law, 122; Wellar v. People, 30 Mich. 16; State v. Shelledy, 8 Iowa, 477; State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776; Com. v. Drum, 58 Pa. 9; State v. McNab, 20 N. H. 160; State v. Barrett, 40 Minn. 77, 41 N. W. 463; People v. Olsen, 80 Cal. 122, 22 Pac. 125; Reddick v. Com. (Ky.) 33 S. W. 416; Reg. v. Greenwood, 7 Cox, Cr. Cas. 404 (communicating venereal disease while committing rape, and death resulting from disease). In REG. v. SERNÉ, supra, Stephen, J., expressed the opinion that the rule should be limited to "any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which causes death." Cf. Com. v. Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

[58] State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.

while to procure the miscarriage of a woman before the child has quickened in the womb is no crime at all; and for this reason, causing the mother's death in attempting to commit an abortion or procure a miscarriage is manslaughter only at common law, provided, of course, the attempt is not made in a way that endangers the mother's life. In the latter case it is murder. In some states, however, abortion is made a felony by statute, and it is so whether the child has quickened or not. It follows from this that, in those states, causing the mother's death in an attempt to procure an abortion is murder, as it is caused in committing a felony.[59]

Resisting Officer

When a constable or other person properly authorized acts in the execution of his duty, the law casts a peculiar protection around him; and consequently, if he is killed in the execution of his duty, it is, in general, murder, even though there be such circumstances of hot blood and want of premeditation as would, in ordinary cases, reduce the crime to manslaughter.[60]

"This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from, the place of action." [61]

If such person is engaged in making a lawful arrest, and the person sought to be arrested, in resisting the arrest, kills

[59] State v. Smith, 32 Me. 369, 54 Am. Dec. 578; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Com. v. Jackson, 15 Gray (Mass.) 187; State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776; Peoples v. Com., 87 Ky. 487, 9 S. W. 509, 810. For cases in which the crime is manslaughter only at common law and by statute, see post, p. 231, note 36.

[60] Reply of Blackburn, J., to statement submitted in Reg. v. Allen, Steph. Dig. Cr. Law, Append. note xv.

[61] Dick, J., in U. S. v. Rice, 1 Hughes, 560, Fed. Cas. No. 16,153.

the other, the homicide is murder.[62] It is also murder if death is caused in resisting a lawful attempt, either by an officer or a private person, to suppress a riot or affray.[63] If the killing occurs in resisting an arrest, the offender, to be guilty of murder, must have notice that the person killed is such officer, or other person having a right to make the arrest, so employed. Notice may be given by words, by production of a warrant or other legal authority, by the known official character of the person so employed, or by the circumstances of the case.[64] As we shall see, if an arrest is unlawfully attempted, the fact may be sufficient provocation to reduce the crime to manslaughter,[65] or the killing may even be justifiable, if necessary to save the life of the person arrested.[66]

Presumption of Malice

It has frequently been declared that every person who kills another is presumed to have killed him with malice aforethought, unless the circumstances are such as to raise a contrary presumption; and the burden of proving

[62] Yong's Case, 4 Coke, 40a; Rex v. Ford, Russ. & R. 329; Mockabee v. Com., 78 Ky. 380; People v. Pool, 27 Cal. 572; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Tom v. State, 8 Humph. (Tenn.) 86; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Snelling v. State, 87 Ga. 50, 13 S. E. 154; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; State v. Mowry, 37 Kan. 369, 15 Pac. 282; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Dilger v. Com., 88 Ky. 550, 11 S. W. 651; Weatherford v. State, 31 Tex. Cr. R. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

[63] Ashton's Case, 12 Mod. 256; Reg. v. Hagan, 8 Car. & P. 167; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Vollmer v. State, 24 Neb. 838, 40 N. W. 420.

[64] Tomson's Case, J. Kelyng, 66; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Steph. Dig. Cr. Law, art. 223.

[65] Post, p. 223.

[66] Miers v. State, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

circumstances of excuse, justification, or provocation is upon the person who is shown to have killed another.[67] And it has been held that the evidence of excuse, justification, or extenuation must preponderate, and that it is not enough to raise a reasonable doubt. Malice aforethought, however, being an essential element in murder, upon principle the burden of proving malice, like any other fact, beyond a reasonable doubt, should, on principle, rest upon the prosecution, and some courts so hold.[68] If, from the facts and circumstances accompanying the homicide as given in evidence by the prosecution or by the defense, no circumstances of excuse, justification, or provocation appear, the burden of proof is sustained by proof of the homicide.[69] But, if the facts and circumstances give rise to a reasonable doubt, the doubt should avail in favor of the accused. If, upon the whole evidence, the jury have a reasonable doubt whether the accused is guilty of the higher offense, they should acquit him. This view has been sustained by many recent cases.[70]

Suicide or Self-Murder

Suicide is murder at common law if committed deliberately by one who has the mental capacity necessary to render him capable of committing crime, or if it results to a

[67] Steph. Dig. Cr. Law, art. 230; Rex v. Greenacre, 8 Car. & P. 35.

[68] Com. v. York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373; Com. v. Webster, 5 Cush. (Mass.) 205, 52 Am. Dec. 711; State v. Byers, 100 N. C. 512, 6 S. E. 420; U. S. v. Crow Dog, 3 Dak. 106, 14 N. W. 437.

[69] People v. Fish, 125 N. Y. 136, 26 N. E. 319. Presumption of malice arises on a killing done with a dangerous weapon calculated to produce death. State v. Brown, 152 Iowa, 427, 132 N. W. 862.

[70] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; State v. Porter, 34 Iowa, 131; People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549; Kent v. People, 8 Colo. 563, 9 Pac. 852. See dissenting opinion of Wilde, J., in Com. v. York, supra.

person having such capacity from his malicious attempt to kill another.[71] In England the punishment for suicide was at one time forfeiture of goods and an ignominious burial, but the former mode of punishment has been done away with, and the only punishment now, if indeed there is any, is denial of Christian burial. In the United States the person committing suicide is not punished, and it has been held that suicide is not a crime on that ground.[72] This reasoning makes the existence of a crime depend on the punishment, whereas the punishment depends on the existence of the crime. Suicide is murder under the general definition of that crime—the killing of a human being with malice aforethought.[73] The mere fact that the offender by his act places himself beyond the reach of punishment no more serves to make his act not a crime than would the fact that one after killing another person should commit suicide and thus make his punishment impossible. The courts, even

[71] 1 Hale, P. C. 413; 4 Bl. Comm. 189.

[72] In New York suicide is declared, by statute, not to be a crime. See Darrow v. Family Fund Soc., 116 N. Y. 542, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430. Under the statutes of Illinois it is held that suicide is not a crime. Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224. Although the courts of Illinois hold that suicide is not a crime under their statutes, yet it is intimated that one who procures another to commit the act of self-destruction may be held liable as a principal to the crime of murder. Burnett v. People, 204 Ill. 208, 68 N. E. 505, at page 511, 66 L. R. A. 304, 98 Am. St. Rep. 206. "It is not a violation of the law of Texas for a person to take his own life. * * * So far as the law is concerned the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law." Grace v. State, 44 Tex. Cr. R. 193, 69 S. W. 529. Under a common form of statute abolishing the distinction between principals and accessaries, one who abets a suicide may be convicted, though he was absent when the suicide occurred. McMahan v. State, 168 Ala. 70, 53 South. 80.

[73] See 4 Bl. Comm. 194. And see State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

those that declare suicide not a crime, recognize this in holding that one who counsels another to commit suicide, and is present when the act is committed, is guilty of murder, as a principal in the second degree.[74] If the adviser is absent at the time of the suicide, he cannot be punished at common law, as he is an accessary before the fact, and an accessary before the fact cannot be punished until conviction of the principal.[75] If two persons agree together to commit suicide, and only one of them kills himself, the other is guilty of murder.[76] An attempt to commit suicide is a misdemeanor, all attempts to commit felonies being misdemeanors.[77] Such an attempt has been held in Massachusetts and Texas not to be punishable; in Texas because suicide was not a crime, and in Massachusetts because of a statute defining felonies.[78]

Statutory Degrees of Murder

At common law there are no degrees of murder. All felonious homicides other than manslaughter are simply murder, and punishable by death. Beginning with Pennsylvania, in 1794, however, most of the states have divided murder into two, and some have divided it into three, degrees, according to the heinousness of the deed; murder in the first degree being generally where there is a premeditated design to effect the death of the person killed, or of some

[74] Rex v. Tyson, Russ. & R. 523; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154; Com. v. Dennis, 105 Mass. 162.

[75] Reg. v. Leddington, 9 Car. & P. 79; ante, p. 118.

[76] Reg. v. Alison, 8 Car. & P. 418; McMahan v. State, 168 Ala. 70, 53 South. 89.

[77] Reg. v. Doody, 6 Cox, Cr. Cas. 463. Suicide is a felony, and one who attempts to commit suicide may be convicted on an indictment for "an attempt to commit a felony." Rex v. Mann, 110 L. T. 781.

[78] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; Grace v. State, 44 Tex. Cr. R. 193, 69 S. W. 520.

other person, or where the killing is done in the commission of or the attempt to commit one of the graver felonies, like arson, robbery, burglary or rape. It would be impracticable to set out the statutes of the different states. They differ somewhat, and each student must consult the statute of his own particular state.

MANSLAUGHTER IN GENERAL

73. Manslaughter is unlawful homicide without malice aforethought, and is either

(a) Voluntary, or

(b) Involuntary.

74. Manslaughter is a felony.

VOLUNTARY MANSLAUGHTER

75. Voluntary manslaughter is committed when the act causing death is done in the heat of sudden passion, caused by provocation.[79]

(a) The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man.

(b) The act must be committed under and because of the passion.

(c) The provocation must not be sought or induced as an excuse for killing or doing bodily harm.

As stated in another connection, the law, regarding the infirmities of human nature, recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from mal-

[79] 4 Bl. Comm. 191.

ice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.[80] Homicide thus committed is manslaughter. It is distinguished from murder by the absence of malice aforethought. The killing need not be unintentional.[81] Intentional killing is only manslaughter if it is committed under and by reason of a passion caused by sufficient provocation. The law does not merely look to see if a man was provoked and enraged, and, if so, reduce his crime to manslaughter, but it also looks at the provocation, to see if it was adequate to excite his passion. The provocation must be sufficient in the eye of the law, or the crime is murder.[82] It has been said that the provocation must be such as is calculated to give rise to irresistible passion in the mind of a reasonable man.[83] It is also necessary that the act causing death shall be committed because of the provocation,[84] for otherwise

[80] STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125; Slaughter v. Com., 11 Leigh (Va.) 681, 37 Am. Dec. 638.

[81] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; People v. Freel, 48 Cal. 436; Dennison v. State, 13 Ind. 510; State v. McDonnell, 32 Vt. 491, 541; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; People v. Lilley, 43 Mich. 521, 5 N. W. 982; Nye v. People, 35 Mich. 16.

[82] Reese v. State, 90 Ala. 624, 8 South. 818.

[83] Territory v. Catton, 5 Utah, 451, 16 Pac. 902. "The law contemplates the case of a reasonable man, and requires that the provocation shall be such that such a man might naturally be induced, in the anger of the moment, to commit the act." Per Keating, J., in Reg. v. Welsh, 11 Cox, Cr. Cas. 336. It is said in a Michigan case that the reason should at the time of the act be disturbed or obscured by passion, to an extent which might render ordinary men, of fair average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment. Maher v. People, 10 Mich. 212, 81 Am. Dec. 781. Rejection of a suitor by a woman is not sufficient. State v. Kotovsky, 74 Mo. 247.

[84] Reg. v. Kirkham, 8 Car. & P. 45; Slaughter v. Com., 11 Leigh

the homicide will be committed with malice aforethought, and the crime will be murder. A killing with malice aforethought cannot be manslaughter.[85] The provocation must deprive one of the power of self-control,[86] but it need not "entirely dethrone reason." [87] Whether or not this was so in any given case is a question for the jury, to be determined from the particular circumstances, having regard to the nature of the act by which death was caused, the time which elapsed between the provocation and the act, and the conduct of the accused during that time.[88] The blow must not only have been inflicted while the accused was under the influence of the provocation, but it must have been inflicted before the passion caused by such provocation had cooled. If there was sufficient time for his passion to cool, he is guilty of murder, though his passion has not in fact subsided.[89] Nor is the provocation available as a

(Va.) 681, 37 Am. Dec. 638; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Collins v. U. S., 150 U. S. 62, 14 Sup. Ct. 9, 37 L. Ed. 998.

[85] State v. Johnson, 23 N. C. 354, 35 Am. Dec. 742; State v. Hildreth, 31 N. C. 429, 51 Am. Dec. 364; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Miller v. State, 32 Tex. Cr. R. 319, 20 S. W. 1103; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; People v. Lilley, 43 Mich. 521, 5 N. W. 982; Collins v. U. S., 150 U. S. 62, 14 Sup. Ct. 9, 37 L. Ed. 998; Slaughter v. Com., 11 Leigh (Va.) 681, 37 Am. Dec. 638; Brown v. Com., 86 Va. 466, 10 S. E. 745; State v. Green, 37 Mo. 466; Riggs v. State, 30 Miss. 635; State v. Gooch, 94 N. C. 987; State v. Hensley, Id. 1021.

[86] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Davis v. People, 114 Ill. 86, 29 N. E. 192.

[87] Smith v. State, 83 Ala. 26, 3 South. 551.

[88] Reg. v. Welsh, 11 Cox, Cr. Cas. 336; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; State v. Hoyt, 13 Minn. 132 (Gil. 125).

[89] Reg. v. Young, 8 Car. & P. 644; State v. McCants, 1 Speer (S. C.) 384; State v. Jacobs, 28 S. C. 29, 4 S. E. 799; People v. Lilley, 43 Mich. 521, 5 N. W. 982; State v. Grayor, 89 Mo. 600, 1 S. W. 365; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; State v. Moore,

defense if it was sought for and induced by the accused with intent to resent it.[90]

Adequacy of Provocation

An assault and battery of such a nature as to inflict actual bodily harm or great insult is deemed in law sufficient provocation to the person assaulted; and if, in a passion caused by the provocation, he at once kills his assailant, he is guilty of manslaughter only.[91] For a child, however, or a woman, to strike a man, might not be sufficient;[92] certainly a blow by a little child would not be, for it could inflict neither harm nor insult. Under some circumstances as assault may be provocation to others than the person assaulted; as, for instance, where a father is provoked by seeing his child whipped.[93] It has even been held that the beating of a wife by her husband is provocation to her father.[94] On the other hand, it has been held that a sister's seduction is not

69 N. C. 267; Kilpatrick v. Com., 31 Pa. 198; State v. Hoyt, 13 Minn. 132 (Gil. 125); Com. v. Aiello, 180 Pa. 597, 36 Atl. 1079.

[90] Stewart v. State, 1 Ohio St. 66; STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125; Melton v. State, 24 Tex. App. 47, 5 S. W. 652; State v. McDaniel, 94 Mo. 301, 7 S. W. 634; People v. Robertson, 67 Cal. 647, 8 Pac. 600.

[91] Fost. Crown Law, 292; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Williams v. State, 25 Tex. App. 216, 7 S. W. 666; Hurd v. People, 25 Mich. 405; Schlect v. State, 75 Wis. 486, 44 N. W. 509.

[92] A blow by a woman with an iron patten, drawing blood, was held sufficient in Stedman's Case, Fost. Crown Law, 292. "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Upon this view I have always doubted Stedman's Case. * * * Where a blow is cruel or unmanly, the provocation will not excuse it." Gibson, C. J., in Com. v. Mosler, 4 Pa. 268.

[93] McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196.

[94] Campbell v. Com., 88 Ky. 402, 11 S. W. 290, 21 Am. St. Rep. 348.

such provocation as will reduce the killing of the seducer by the brother to manslaughter,[95] and that anger and resentment because deceased killed defendant's friend or cousin is not sufficient.[96] Rejection by a suitor is not sufficient provocation to reduce the killing of the suitor to manslaughter.[97] If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, and it is immaterial which is right in the quarrel, or which struck the first blow.[98] It must be remembered, however, that the killing of a person in mutual combat must be caused by the provocation, and that otherwise the crime is murder; and the mere fact of struggle is not enough to raise the presumption of passion, where the circumstances are as consistent with premeditated malice as with heat of passion.[99] An unlawful imprisonment is provocation to the person imprisoned; and it has been held, even to bystanders.[1] So, also,

[95] State v. Hockett, 70 Iowa, 442, 30 N. W. 742.

[96] State v. Gut, 13 Minn. 341 (Gil. 315); Reese v. State, 90 Ala. 624, 8 South. 818. Contra, where defendant saw his friend shot down by deceased. Moore v. State, 26 Tex. App. 322, 9 S. W. 610.

[97] State v. Kotovsky, 74 Mo. 247.

[98] State v. Massage, 65 N. C. 480; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Gann v. State, 30 Ga. 67; State v. McCants, 1 Speer (S. C.) 384; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; State v. McDonnell, 32 Vt. 491; Battle v. State, 92 Ga. 465, 17 S. E. 861; State v. Hildreth, 31 N. C. 429, 51 Am. Dec. 364; STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125; State v. Roberts, 8 N. C. 349, 9 Am. Dec. 643; Schlect v. State, 75 Wis. 486, 44 N. W. 509. If the slayer uses concealed weapons, or otherwise takes an undue advantage, the homicide is murder. Price v. State, 36 Miss. 531, 72 Am. Dec. 195; State v. Ellick, 60 N. C. 450, 86 Am. Dec. 442. Quarrel, abusive language, and excitement, Perkins v. State, 78 Wis. 551, 47 N. W. 827.

[99] State v. Jones, 98 N. C. 651, 3 S. E. 507.

[1] Reg. v. Tooley, 2 Ld. Raym. 1296. See, also, Rex v. Adey, 1 Leach, C. C. (4th Ed.) 206. But see Huggett's Case, Kel. 59; Steph. Dig. Cr. Law, art. 226, and note ix, p. 390.

is an attempt to arrest by officers of justice whose character as such is unknown,[2] or whose character is known, but who are acting without a warrant where a warrant is necessary, or under a warrant which is so irregular as to make the arrest illegal.[3] Some courts have apparently held that killing in resistance of an unlawful arrest is justifiable or excusable, and does not even amount to manslaughter, but this was no doubt where life or grievous bodily harm was threatened.[4] The fact, however, that an attempted arrest is illegal will not reduce the killing in resisting it to manslaughter, unless the accused knew it was illegal; for, as stated in the black-letter text, the killing must have been because of adequate provocation, and, if the accused did not know the arrest was unlawful, there was no provocation.[5] The sight

[2] Yates v. People, 32 N. Y. 509; Mockabee v. Com., 78 Ky. 380; Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Drennan v. People, 10 Mich. 169.

[3] Reg. v. Thompson, 1 Moody, Cr. Cas. 80; Com. v. Drew, 4 Mass. 391; Rafferty v. People, 69 Ill. 111, 18 Am. Rep. 601; Id., 72 Ill. 37; Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; People v. Burt, 51 Mich. 200, 16 N. W. 378; Briggs v. Com., 82 Va. 554; State v. Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106; Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812; State v. Spaulding, 34 Minn. 361, 25 N. W. 793. If accused without warning an officer to desist from the attempt to arrest him, in cool blood, and with malice, intentionally kills the officer, he is guilty of murder, though the officer acted illegally in attempting to make the arrest. Com. v. Phelps, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566. Where a sheriff in pursuit shot at a fleeing misdemeanant, and the fugitive thereupon fired in return, the sheriff being killed in the interchange of shots which followed, it was held that the lower court was right in charging that the defendant must be convicted of manslaughter at least, on the theory that it was the commission of homicide while engaged in an act malum in se—armed resistance to the process of the state. State v. Durham, 141 N. C. 741, 53 S. E. 720, 5 L. R. A. (N. S.) 1016.

[4] Simmerman v. State, 14 Neb. 568, 17 N. W. 115.

[5] Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812. And see

by a husband of the act of adultery committed by his wife is provocation to him on the part both of the wife and her paramour; and, if he kills either or both, he is guilty of manslaughter only.[6] It is generally held that he must see the act however, and that mere knowledge of his wife's infidelity is not sufficient.[7]

That circumstances are so compromising as to induce a

Graham v. State, 28 Tex. App. 582, 13 S. W. 1010. But see Reg. v. Tooley, 2 Ld. Raym. 1296: "They say, likewise, that in the case at bar it could not be a provocation to the prisoners, because they knew not she was illegally arrested; but surely ignorantia facti will excuse, but never condemn, a man. Indeed, he acts at his peril in such a case; but he must not lose his life for his ignorance, when he happens to be in the right."

[6] Pearson's Case, 2 Lewin, Cr. Cas. 216; State v. Samuel, 48 N. C. 74, 64 Am. Dec. 596; Hooks v. State, 90 Ala. 166, 13 South. 767; Mays v. State, 88 Ga. 399, 14 S. E. 560; State v. Pratt, Houst. Cr. Cas. (Del.) 265; Jones v. People, 23 Colo. 276, 47 Pac. 275. One who is merely the husband's agent for the purpose of detecting the wife's adultery is not within the rule, People v. Horton, 4 Mich. 67; nor is a brother seeing a man in adultery with his sister, Lynch v. Com., 77 Pa. 205.

[7] 1 Hale, P. C. 486; Fost. Crown Law, 296; State v. Samuel, 48 N. C. 74, 64 Am. Dec. 596; State v. Neville, 51 N. C. 423; State v. John, 30 N. C. 330, 49 Am. Dec. 396; State v. Anderson, 98 Mo. 461, 11 S. W. 981; Sawyer v. State, 35 Ind. 83; State v. Avery, 64 N. C. 609; State v. Harman, 78 N. C. 519; Bugg v. Com. (Ky.) 38 S. W. 684. But see Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, State v. Holme, 54 Mo. 153, and Reg. v. Rothwell, 12 Cox, Cr. Cas. 145. In the latter case Blackburn, J., instructed the jury that although, in general, mere words are not enough, they may be under special circumstances; as, if a husband, being told by his wife that she had committed adultery, and having no idea of it before, were thereupon to kill her. Under statutes in some states, the killing is reduced to manslaughter if it occurs as soon as the fact of adultery is discovered. Pickens v. State, 31 Tex. Cr. R. 554, 21 S. W. 362. Where a husband killed his wife in a passion, because, to vex and insult him, she told him he was not the father of her children, this was held not to be sufficient provocation. Fry v. State, 81 Ga. 645, 8 S. E. 308. See, also, ante, p. 179, note 45.

reasonable belief that adultery is being committed has been held sufficient, on the doctrine of mistake of fact, to reduce the killing of the supposed paramour from murder to manslaughter.[8] This, however, seems erroneous, for the definition of voluntary manslaughter requires that there be provocation from the person killed, and in the case supposed the person killed furnished no provocation. There was the requisite passion in the husband, it is true; but all the cases agree that such passion is not sufficient. There must be passion induced by provocation on the part of the person killed.[9]

Trespasses or other injuries to property[10] or breaches of contract [11] do not, of themselves, amount to sufficient provocation for an act of resentment likely to endanger life. It is generally said in the text-books and cases that as a matter of law neither insulting nor abusive words or gestures are sufficient provocation.[12] But the tendency now is to regard the adequacy of the provocation as a matter of fact for the

[8] State v. Yanz, 74 Conn. 177, 50 Atl. 37, 54 L. R. A. 780, 92 Am. St. Rep. 205.

[9] See Shufflin v. People, 62 N. Y. 229, 20 Am. Rep. 483.

[10] State v. Hoyt, 13 Minn. 132 (Gil. 125); State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200; Sellers v. State, 99 Ga. 689, 26 S. E. 484, 59 Am. St. Rep. 253. See, also, ante, p. 188.

[11] State v. Berkley, 109 Mo. 665, 19 S. W. 192.

[12] Lord Morly's Case, J. Kelyng, 53; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; People v. Butler, 8 Cal. 435; People v. Murback, 64 Cal. 369, 30 Pac. 608; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Lane v. State, 85 Ala. 11, 4 South. 730; Friederich v. People, 147 Ill. 310, 35 N. E. 472; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Elliott, 90 Mo. 350, 2 S. W. 411; State v. Sansone, 116 Mo. 1, 22 S. W. 617; State v. Berkley, 109 Mo. 665, 19 S. W. 192; Ex parte Sloane, 95 Ala. 22, 11 South. 14; People v. Olsen, 4 Utah, 413, 11 Pac. 577; State v. Bethune, 86 S. C. 143, 67 S. E. 466. Defamatory newspaper article not sufficient provocation. State v. Elliott (Ohio Com. Pl.) 26 Wkly. Law Bul. 116.

jury, and not a matter of law for the court. "There are circumstances where words do amount to a provocation in law; i. e., a reasonable provocation to be submitted to the determination of the jury, and, if found by them to exist, then the crime is lowered to the grade of manslaughter." [13] In several states statutes make insults to a man's female relatives sufficient provocation to reduce a killing to manslaughter.[14] In all cases the mode of resentment must bear a reasonable proportion to the provocation. A homicide is not reduced to manslaughter where a deadly weapon is used, unless the provocation was extreme.[15]

[13] Sherwood, J., in STATE v. GRUGIN, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553, Mikell Illus. Cas. Criminal Law, 127. See, also, Reg. v. Rothwell, 12 Cox, Cr. Cas. 145. In Duthey v. State, 131 Wis. 178, 111 N. W. 222, 10 L. R. A. (N. S.) 1032, where a wife had eloped, returned, and become reconciled to her husband, and later was seen by the husband with her old paramour under conditions that led the husband to believe they were ridiculing him, it was held that there was sufficient provocation. But in Rex v. Palmer, [1913] 2 K. B. 29, it was held that a killing by defendant of his betrothed in a passion caused by her confession of illicit intercourse during their engagement was murder, not manslaughter.

[14] Norman v. State, 26 Tex. App. 221, 9 S. W. 606. What are insults, Simmons v. State, 23 Tex. App. 653, 5 S. W. 208; Granger v. State, 24 Tex. App. 45, 5 S. W. 648. Insult to one's affianced wife, Lane v. State, 29 Tex. App. 310, 15 S. W. 827. The killing in such case must be the result of passion caused by the insult, Norman v. State, 26 Tex. App. 221, 9 S. W. 606; and must occur as soon as the words are uttered, or at the first meeting after being informed of the insult, Ex parte Jones, 31 Tex. Cr. R. 422, 20 S. W. 983; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Pitts v. State, 29 Tex. App. 374, 16 S. W. 189; Howard v. State, 23 Tex. App. 265, 5 S. W. 231; Orman v. State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662; Melton v. State, 24 Tex. App. 47, 5 S. W. 652; Williams v. State, 24 Tex. App. 637, 7 S. W. 333. Similar statutes have been enacted in Delaware, Laws 1893, c. 127, § 5; and Utah, Rev. St. 1898, § 4168.

[15] Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; State v. Hoyt, 13 Minn. 132 (Gil. 125).

Distinguished from Self-Defense

Manslaughter resulting from provocation must not be confounded with homicide in self-defense. In the latter the blow is excused, because necessary to save the life of the person striking it, or to prevent grievous bodily harm; while in manslaughter there is no such necessity, and the blow is only partially excused, because given in the heat of passion.

When it is said that the killing to be voluntary manslaughter must be done in the "heat of passion," the word "passion" has usually been construed to mean the passion of anger. The passion of the definition may however, be the passion of fear.[16]

Hot Blood

A voluntary felonious killing, to be reduced from murder to manslaughter, must have been done in the heat of passion, or as it is sometimes expressed, in "hot blood." It is the existence of hot blood that negatives the malice of murder. The heat of passion, or hot blood, need not be so great as to make the accused unconscious that he was about to kill, or strip the act of killing of an intent to commit it. It need not be so overpowering as for the time to "shut out knowledge and destroy volition." [17]

It is sufficient "if it rendered him deaf to the voice of reason, so that the act, though intentional of death, was not the result of malignity of heart, but imputable to human infirmity." [18] As otherwise expressed the heat of passion is sufficient if the reason was at the time of the act "disturbed or

[16] U. S. v. King (C. C.) 34 Fed. 302; Com. v. Colandro, 231 Pa. 343, 80 Atl. 571.

[17] STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125.

[18] STATE v. HILL, 20 N. C. 629, 34 Am. Dec. 396, Mikell Illus. Cas. Criminal Law, 125.

obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment." [19]

Not only must there have been hot blood, but the killing must have been done while the heat of blood existed. If the provocation was sufficient to cause hot blood, and did in fact cause it, yet if the blood had in fact cooled before the killing, the killing is murder, not manslaughter.[20] But it is not necessarily manslaughter only, even though the blood has not cooled before the killing. If there was time before the killing for the blood to have cooled, the killing is murder, not manslaughter. The test is: Was there time between the provocation and the killing for the ordinarily reasonable man under the circumstances to have cooled? "He who has received a sufficient legal provocation, such as might have mitigated to manslaughter a mortal blow proceeding from it and given instantly, would not be less than a murderer if he should remain in apparently undiminished fury for a length of time, unreasonable under the circumstances, and then kill. By lashing himself into greater fury by outward demonstrations of passion, no one should obtain upon trial any advantage over another who, in like circumstances, should in reasonable time master his passions." [21]

Whether in a given case there was sufficient length of time between the provocation and the fatal stroke for the blood of a reasonable man under the circumstances to have cooled is by some courts held to be a question of law for the court to determine.[22] But the better rule and the one

[19] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781.

[20] 1 East, P. C. 251.

[21] Wardlaw, J., in State v. McCants, 1 Speer (S. C.) 384.

[22] Rex v. Oneby, 1 Ld. Raymd. 1485; Reg. v. Fisher, 8 Car. & P. 182.

applied by the more modern cases is that it is a question of fact to be determined by the jury.[23]

INVOLUNTARY MANSLAUGHTER

76. Involuntary manslaughter is homicide unintentionally caused,[24]

(a) In the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or

(b) By culpable negligence

(1) In performing a lawful act, or

(2) In omitting to perform a legal duty.

Unlawful Act

Manslaughter while engaged in an unlawful act is distinguished from excusable homicide by accident, by the fact that in manslaughter the act is unlawful; and it is distinguished from murder by killing another in committing another felony, or inflicting bodily injury likely to cause death, by the fact that in manslaughter the unlawful act does not amount to a felony, and is not likely to cause death.[25] It must also be distinguished from murder in perpetrating a reckless or wanton act endangering the life of another. The act must be malum in se, and not merely malum prohibitum. To run over a person while driving at a speed

[23] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Rex v. Lynch, 5 C. & P. 324; Rex v. Howard, 6 C. & P. 157. "The court should, I think, define to the jury the principles upon which the question is to be decided, and leave them to determine whether the time was reasonable under all the circumstances of the particular case. I do not mean to say that the time may not be so great as to enable the court to determine that it is sufficient for the passion to have cooled, or so to instruct the jury, without error; but the case should be very clear." Christiancy, J., in Maher v. People, supra.

[24] 4 Bl. Comm. 192. [25] See Fray's Case, 1 East, P. C. 236.

prohibited by a city ordinance, but not furiously or recklessly, would not render one guilty of manslaughter, as the excessive speed is wrong only because it is prohibited by the ordinance, and is not malum in se.[26] A prize fighter or other person voluntarily engaged in mutual combat, if he unintentionally kills his adversary, is guilty of manslaughter, because fighting is wrong and unlawful in itself. He must, however, be willingly fighting. The law permits a man to defend himself against an assault, and to defend his property, so long as he does not carry the defense so far as to endanger his assailant's life, or to inflict greivous bodily harm; and if, while keeping within proper limits, he accidentally kills his assailant, he is excused on the ground of accident.[27] He is not in such case engaged in doing an unlawful act. The law allows persons to engage in lawful athletic sports, such as football, sparring, and wrestling; and, if one participant is accidentally killed by another while playing the game lawfully, the homicide is excusable.[28] If, however, the game is played in an unlawful manner, as where unlawful force is used, the killing is at least manslaughter.[29] If an act is so unlawful as to amount to an assault and battery, a killing caused thereby will amount

[26] COM. v. ADAMS, 114 Mass. 323, 19 Am. Rep. 362, Mikell Illus. Cas. Criminal Law, 30. And see Estell v. State, 51 N. J. Law, 182, 17 Atl. 118; ante, p. 194.

[27] Reg. v. Knock, 14 Cox, Cr. Cas. 1.

[28] Reg. v. Bradshaw, 14 Cox, Cr. Cas. 83; Reg. v. Knock, 14 Cox, Cr. Cas. 1.

[29] Reg. v. Bradshaw, 14 Cox, Cr. Cas. 83. If a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But independently of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that in charging as he did he might produce serious injury, and was indifferent and reckless as to wheth-

to manslaughter, at least, and under some circumstances it may amount to murder.[80]

Suicide is at least malum in se, even when it is not regarded as a crime, and to kill another in an attempt to commit suicide would be manslaughter at least.[81] In those jurisdictions where suicide is still regarded as a felony, as it has always been regarded at common law, to kill another in an attempt to commit suicide is murder.[82] To assault a person being an unlawful act, it has been held that a man who strikes a woman while she is nursing an infant, and frightens the infant, so as to cause its death, is guilty of manslaughter, provided, of course, it is shown that the death of the infant was caused by the fright.[83] A parent may moderately punish his child, but, if he punishes it immoderately, he commits an unlawful act—an assault—and, if death is caused, he is guilty of manslaughter.[84] If a deadly weapon is used, or immoderate correction likely to cause death is willfully inflicted, the crime is murder.[85] To commit an abortion is a misdemeanor at common law, and to procure a miscarriage where the child has not quickened in the womb is at least wrong per se, if not a crime; and therefore, if the mother is killed, the homicide is manslaughter. In some states the homicide is expressly declared manslaughter by the statute.[86] So, also, where a drug is

er he would produce serious injury or not, then the act would be unlawful." Bramwell, L. J., in Reg. v. Bradshaw, supra.

[80] People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883.

[81] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.

[82] Ante, p. 212, footnote 58.

[83] Reg. v. Towers, 12 Cox, Cr. Cas. 530.

[84] 1 East, P. C. 261; Powell v. State, 67 Miss. 119, 6 South. 646. See, also, ante, p. 193, footnote 95; post, p. 270.

[85] Grey's Case, J. Kelyng, 64; Powell v. State, 67 Miss. 119, 6 South. 646; ante, p. 211.

[86] People v. Olmstead, 30 Mich. 431; Yundt v. People, 65 Ill. 372; Willey v. State, 46 Ind. 363; Peoples v. Com., 87 Ky. 487, 9 S. W.

administered to a female for unlawful purposes, and she dies therefrom, the killing is manslaughter.[37] In all cases the death must be sufficiently connected with the unlawful act in the relation of cause and effect.[38] Thus, it has been held that if an officer fires his pistol at persons who are resisting arrest and attacking him, and accidentally kills a bystander, the persons so resisting, though engaged in an unlawful act, are not guilty of the homicide.[39]

Negligence

If a person, in doing a lawful act, neglects to take precautions that a reasonable man would take to prevent injury, and by reason of such neglect another is killed, he is guilty of involuntary manslaughter. Such is the case where a workman, without looking, throws stones or other material from a building into a street along which persons are likely to pass, and causes the death of a passer-by. If he knows that persons are passing, the act is wanton, so as to supply malice, and he is guilty of murder. If it is at a place where there is no reason to suppose people may be passing, the homicide is excusable.[40] A person who turns out a vicious animal where it may do harm is guilty of manslaughter if it attacks and kills a person.[41] A person who causes another's death by the negligent use of a pistol or gun, where the

509, 810; State v. Fitzporter, 93 Mo. 390, 6 S. W. 223. For the cases in which the crime is held to be murder, see ante, p. 213, note 59.

[37] State v. Center, 35 Vt. 378.

[38] Reg. v. Towers, 12 Cox, Cr. Cas. 530; Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; Estell v. State, 51 N. J. Law, 182, 17 Atl. 118. One who knocks another down with his fist is not liable for his death caused by being struck by a horse, while lying where he fell. People v. Rockwell, 39 Mich. 503. See, also, ante, p. ——.

[39] Butler v. People, 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211, 8 Am. St. Rep. 423.

[40] Rex v. Hull, Kel. J. 40.

[41] Reg. v. Dant, 10 Cox, Cr. Cas. 102.

negligence is not so wanton as to make the killing murder,[42] or who causes death by negligently leaving powder or poison where it may endanger life, or by reckless driving,[43] or a physician or other person who causes death by gross negligence in treating disease or performing an operation,[44] is guilty of manslaughter. So, also, ignorance or negligence may render the engineer of a railroad train or steamboat guilty of manslaughter, where death is caused thereby.[45] As has already been stated in another connection, if a person, acting in self-defense against an assault, negli-

[42] People v. Fuller, 2 Parker, Cr. R. (N. Y.) 16; Reg. v. Salmon, 14 Cox, Cr. Cas. 494, 6 Q. B. Div. 79; Rex v. Rampton, Kel. J. 40; State v. Vance, 17 Iowa, 138; State v. Hardie, 47 Iowa, 647, 26 Am. Rep. 496; Sparks v. Com., 3 Bush (Ky.) 111, 96 Am. Dec. 196; Murphy v. Com. (Ky.) 22 S. W. 649; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; Com. v. McLaughlin, 5 Allen (Mass.) 507; State v. Morrison, 104 Mo. 638, 16 S. W. 492; People v. Slack, 90 Mich. 448, 51 N. W. 533; Com. v. Matthews, 89 Ky. 287, 12 S. W. 333; State v. Emery, 78 Mo. 77, 47 Am. Rep. 92; State v. Vines, 93 N. C. 493, 53 Am. Rep. 466; Studstill v. State, 7 Ga. 2; State v. Roane, 13 N. C. 58; Collier v. State, 39 Ga. 31, 99 Am. Dec. 449; Robertson v. State, 2 Lea (Tenn.) 239, 31 Am. Rep. 602.

[43] Rex v. Grout, 6 Car. & P. 629; Rex v. Knight, 1 Lewin, Cr. Cas. 168; Reg. v. Dalloway, 2 Cox, Cr. Cas. 273; Lee v. State, 1 Cold. (Tenn.) 62; Belk v. People, 125 Ill. 584, 17 N. E. 744.

[44] Reg. v. Chamberlain, 10 Cox, Cr. Cas. 486; State v. Reynolds, 42 Kan. 820, 22 Pac. 410, 16 Am. St. Rep. 483; Com. v. Thompson, 6 Mass. 134; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264; Rice v. State, 8 Mo. 561; State v. Schulz, 55 Iowa, 628, 8 N. W. 469, 39 Am. Rep. 187. For a review of the cases on this point, see 1 Ben. & H. Lead. Cas. 55–59.

[45] U. S. v. Taylor, 5 McLean, 242, Fed. Cas. No. 16,441; U. S. v. Farnham, 2 Blatchf. 528, Fed. Cas. No. 15,071; U. S. v. Keller (C. C.) 19 Fed. 633; State v. Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111; Com. v. Cook (Pa. Quart. Sess.) 8 Pa. Co. Ct. R. 486. Brakeman not liable under Texas statute. Anderson v. State, 27 Tex. App. 117, 11 S. W. 33, 3 L. R. A. 644, 11 Am. St. Rep. 189; STATE v. O'BRIEN, 32 N. J. Law, 169, Mikell Illus. Cas. Criminal Law, 34.

gently comes to the erroneous conclusion that his life is in imminent danger, and kills his assailant, he is guilty of manslaughter, and the homicide is not excused on the ground of self-defense, as would be the case were he not guilty of negligence.[46]

Same—Failure to Perform Legal Duty

If the law requires a person to do an act, and he culpably neglects his duty, so as to cause the death of another, he is guilty of involuntary manslaughter. Thus, a parent is required to furnish food and medical attendance to a child who is dependent upon him, if he is able to do so; and if he neglects this duty, and the child dies, he is guilty of manslaughter.[47] Of course, if he willfully and maliciously fails to furnish such support, he is guilty of murder. So, also, if a person fails to furnish food and medicine to a sick person under his charge and care,[48] or exposes one whom he

[46] CARROLL v. STATE, 23 Ala. 28, 58 Am. Dec. 282, Mikell Illus. Cas. Criminal Law, 105; U. S. v. Heath (D. C.) 19 Wash. Law Rep. 818.

[47] Reg. v. Friend, Russ. & R. 20; Reg. v. Conde, 10 Cox, Cr. Cas. 547; Reg. v. Nichols, 13 Cox, Cr. Cas. 75; Reg. v. Bubb, 4 Cox, Cr. Cas. 455; Reg. v. Morley, 8 Q. B. Div. 571; Reg. v. Downes, 13 Cox, Cr. Cas. 111.

[48] Self's Case, 1 East, P. C. 226; Reg. v. Instan, 1 Q. B. Div. 450. Where a person having custody of a child fails, by reason of religious belief, to furnish medical aid, and its death is thereby caused or accelerated, he is guilty of manslaughter, a statute in the jurisdiction making it a misdemeanor for one standing in loco parentis to "willfully neglect" a child. Reg. v. Senior, [1899] 1 Q. B. 283, 19 Cox, Cr. Cas. 219. Defendant, standing in loco parentis to a boy of 15 years, failed to furnish medical attendance and food during the child's sickness, and the child died. The defendant believed that such treatment of the disease was not efficacious, and that prayer and fasting was the correct method of treating disease, but he failed to do either. No statute of the state made the furnishing of medical aid necessary. Defendant was indicted for manslaughter. The court held that the defendant was excused from doing what he honestly

is bound to protect to the weather,[49] and thereby causes his death, he is guilty of manslaughter. A railroad employé charged with the duty of signaling trains or managing switches, or of warning persons at railroad crossings of the approach of trains, is charged with a legal duty, and may be guilty of manslaughter if he neglects to perform it, and a death results.[50] So, also, an employé in a mine, charged with the duty of ventilating it so as to protect his fellow servants from deadly gases, or an employé charged with the duty of managing the appliances in a mine, is guilty of manslaughter if he neglects his duty, and thereby causes the death of a fellow servant.[51] In all cases, however, there must be a legal, as distinguished from a moral, duty to act. Notwithstanding the statements in some of the books that Christianity is a part of our common law, the law does not punish the neglect of a mere moral duty.[52] The Bible teaches us to feed the hungry, to clothe the naked, and to take in strangers and warm them; but the law does not punish a man for failure to take in a starving waif, and feed and clothe him, even though he may know that if the child

believed should not be done, and that to convict the defendant it must be found that death resulted from a neglect to do what he honestly believed should have been done, but that, inasmuch as whether the defendant's neglect to pray caused the death of the deceased was not a competent question for the jury, the defendant must be excused. State v. Sandford, 99 Me. 441, 59 Atl. 597.

[49] Territory v. Manton, 8 Mont. 95, 19 Pac. 387; State v. Holt, 23 N. H. 355; State v. Smith, 65 Me. 257.

[50] STATE v. O'BRIEN, 32 N. J. Law, 169, Mikell Illus. Cas. Criminal Law, 34. Where a gatekeeper at a railroad crossing negligently failed to close the gates and a pedestrian was killed by a passing train the gatekeeper was guilty of manslaughter. Rex v. Pitwood, 19 T. L. R. 37.

[51] Reg. v. Haines, 2 Car. & K. 368; Reg. v. Lowe, 3 Car. & K. 123, 4 Cox, Cr. Cas. 449; Reg. v. Hughes, 7 Cox, Cr. Cas. 301.

[52] Ante, p. 25.

is left exposed to the weather, and not fed, he will freeze or starve to death; and, indeed, he would not be punished should he for some reason even wish such result. A person who is under no legal duty to render care and attention to another, whatever may be his moral duty, is not guilty of manslaughter if death is the result of his neglect.[53]

Thus it has been held that a mother does not owe to her daughter, a girl of eighteen years of age and emancipated, any duty to procure a midwife for the daughter, who had returned to the mother's home, and while there was brought to bed with an illegitimate child, and that the mother was therefore not guilty of manslaughter for neglecting to procure the services of such midwife.[54] So it has been held that a woman who is about to become a mother is not guilty of manslaughter in neglecting to take precautions before the child's birth to preserve the life of the infant.[55] It has recently been held that a man does not owe such a legal duty to a woman accustomed to debauchery and assignations, whom he has taken to his rooms for carousal, as to render him guilty of manslaughter in neglecting to summon medical aid for her, in consequence of which neglect she died.[56]

If a legal duty exists, it is immaterial whether it arose from the natural relationship of the parties or from contract. Thus, when the accused contracted to take care of an old woman in return for a sum of money, it was held that he was guilty of manslaughter it she died through his neglect to furnish her with necessaries.[57]

[53] Reg. v. Smith, 2 Car. & P. 447; Reg. v. Shepherd, 9 Cox, Cr. Cas. 123. And see Thomas v. People, 2 Colo. App. 513, 31 Pac. 349.

[54] Reg. v. Shepherd, 1 Leigh & Cave, 147.

[55] Reg. v. Knights, 2 Foster & Fin. 46.

[56] People v. Beardsley, 150 Mich. 206, 113 N. W. 1128, 13 L. R. A. (N. S.) 1020, 121 Am. St. Rep. 617, 13 Ann. Cas. 39.

[57] Reg. v. Marriott, 8 Car. & P. 425.

Not every omission of a legal duty, causing death, will amount to manslaughter. The duty must be one "connected with life, so that the ordinary consequence of neglecting it would be death." [58] No matter how gross the negligence in performing a duty may be if the neglect to perform it would not reasonably result in death or serious injury, the killing is not manslaughter. Thus, where trustees of a road, legally bound to keep it in repair, omitted to do so, so that it became so ruinous that a cart which deceased was driving fell into a hole, and deceased was thrown out and killed, it was held that the trustees were not guilty of manslaughter, as the death was not the ordinary consequence of the neglect of duty.[59]

The extent of the negligence required to make one guilty of manslaughter is sometimes described as "gross" negligence; sometimes as "clear" negligence.[60] These terms are not very helpful. It seems better to describe negligence in terms of care or caution, and to say that one is guilty of manslaughter if the death was caused by such an act or omission on his part as a reasonable man under the circumstances would have known would be likely to result in death or serious bodily harm.[61] He is not guilty merely because he did not adopt the *safest* mode of doing the act, even though he could easily have adopted that mode;[62] on the other hand, to be guilty he need not have adopted a clearly unsafe mode. The test is: Did he exercise such care as a reasonable man under the circumstances would have exercised?

[58] Erle, J., in Reg. v. Pocock, 5 Cox, Cr. Cas. 172.

[59] Reg. v. Pocock, 5 Cox, Cr. Cas. 172.

[60] Reg. v. Macleod, 12 Cox, Cr. Cas. 534.

[61] See Rigmaidon's Case, 1 Lewin, C. C. 180; STATE v. O'BRIEN, 32 N. J. Law, 169, Mikell Illus. Cas. Criminal Law, 34.

[62] Rigmaidon's Case, supra.

The omission to perform the duty must, of course, be the cause of the death, to make the person derelict guilty of manslaughter; if the criminal or negligent act of another intervenes between the negligent act of the accused and the death, and is the direct cause of the death, the accused is not liable.[63]

Contributory Negligence

Where the culpably negligent acts of two or more persons concur in causing another's death, all of them are guilty.[64] There are some cases which hold that on a prosecution for manslaughter by negligence, as, for instance, by careless driving, contributory negligence on the part of the deceased is a good defense, it being said in one case that a person will not be held criminally liable for negligence, where he would not be held liable therefor in an action,[65] but the weight of authority is to the effect that contributory negligence is no defense.[66]

Principals and Accessaries

It is not certain that there can be accomplices in manslaughter. It has been said that there cannot.[67] There certainly could not be an accessary before the fact to manslaughter by negligence, nor to manslaughter in the heat of passion caused by provocation; since, to constitute one an accessary, he must be absent when the act is committed, and there must, in the nature of things, be some premeditation, and both absence and premeditation are inconsistent

[63] Reg. v. Bennett, Bell, 1.

[64] Reg. v. Swindall, 2 Car. & K. 230; Com. v. Cook (Pa. Quart. Sess.) 8 Pa. Co. Ct. R. 486; Belk v. People, 125 Ill. 584, 17 N. E. 744.

[65] Reg. v. Birchall, 4 Fost. & F. 1087.

[66] Reg. v. Kew, 12 Cox, Cr. Cas. 355; REG. v. LONGBOTTOM, 3 Cox, Cr. Cas. 439, Mikell Illus. Cas. Criminal Law, 10.

[67] Bowman v. State (Tex. Cr. App.) 20 S. W. 558.

with manslaughter so committed. There seems no good reason, however, why there might not be accessaries before the fact to manslaughter in doing an unlawful act. A prize fighter is guilty of manslaughter if he unintentionally kills his adversary. Why should not all those who advised and abetted the fight be held liable as accessaries? There may be principals in the second degree to manslaughter. Thus, it has been held that a man who, without any predetermined purpose, but under the influence of a momentary excitement, aids and abets his friend in an affray, is not guilty of murder if his friend kills his adversary, but is liable as an aider and abetter for the manslaughter.[62]

Statutory Degrees of Manslaughter

In some of the states manslaughter, like murder, has been by statute divided into degrees. The student should consult the statute of his state. If he understands murder and manslaughter at common law, he will have no difficulty in understanding the statute.

[62] State v. Coleman, 5 Port. (Ala.) 32. See, also, Hagan v. State, 10 Ohio St. 459; Goins v. State, 46 Ohio St. 457, 21 N. E. 476; Woolweaver v. State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667. See People v. Holmes, 118 Cal. 444, 50 Pac. 675.

CHAPTER IX

OFFENSES AGAINST THE PERSON (Continued)

77–78. Mayhem.
79–80. Rape.
81–83. Assault and Battery.
84. False Imprisonment.
85. Kidnapping.
86–87. Abduction.

MAYHEM

77. Mayhem, at common law, is a hurt of any part of a man's body, whereby he is rendered less able, in fighting, either to defend himself or annoy his adversary.[1] By statute it is extended so as to cover injuries merely disfiguring.

78. Mayhem is a felony in some jurisdictions, and a misdemeanor only in others.

At common law the injury must be such as renders the victim less able physically to fight, or to defend himself in a fight. If the injury merely disfigures him, without impairing his corporal abilities, it is not mayhem. Thus, it is mayhem at common law to put out a man's eye,[2] to cut off his hand or his foot or finger, or even to knock out a front tooth, as these are members which he may use in fighting; but it is otherwise where the ear or nose is cut off, or a back tooth knocked out, as these injuries merely disfigure him.[3] Statutes, however, have been passed in most of the

[1] 1 East, P. C. 393; 4 Bl. Comm. 205.
[2] Chick v. State, 7 Humph. (Tenn.) 161.
[3] A count charging malicious biting of ear with intent to maim

states making it mayhem to maliciously disfigure a person; as, for instance, by cutting off an ear or part of an ear.[4] Under the statutes in some of the states a specific intent to disfigure is an essential element of the crime,[5] while in others no specific intent is necessary.[6] Mayhem is not justifiable or excusable because it was inflicted in a sudden fight. It is only excused where it is necessarily inflicted on an assailant to prevent grievous bodily harm or death.[7] Some

cannot be supported as to the intent charged, as biting an ear is not mayhem. State v. Johnson, 58 Ohio St. 417, 51 N. E. 40, 65 Am. St. Rep. 769.

[4] Foster v. People, 50 N. Y. 598; Godfrey v. People, 63 N. Y. 207; Riflemaker v. State, 25 Ohio St. 395; State v. Brown, 60 Mo. 141; Eskridge v. State, 25 Ala. 30; Com. v. Hawkins, 11 Bush (Ky.) 603. Throwing corrosive fluid into another's eyes. State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414. Injuring private parts of woman, with intent to disfigure, is mayhem under statute. Kitchens v. State, 80 Ga. 810, 7 S. E. 209. Kicking person while his thumb is in another's mouth, causing it to be torn off. Bowers v. State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901. Knocking out front tooth. High v. State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488. Biting piece out of lip. State v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895. Biting off ear. People v. Wright, 93 Cal. 564, 29 Pac. 240; State v. Green, 29 N. C. 39; State v. Abram, 10 Ala. 928. If the member is replaced and grows again, the injury is nevertheless mayhem. Slattery v. State, 41 Tex. 619.

[5] State v. Jones, 70 Iowa, 505, 30 N. W. 750; State v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895; Davis v. State, 22 Tex. App. 45, 2 S. W. 630; State v. Evans, 2 N. C. 281; State v. Hair, 37 Minn. 351, 34 N. W. 893; U. S. v. Gunther, 5 Dak. 234, 38 N. W. 79; People v. Wright, 93 Cal. 564, 29 Pac. 240; State v. Simmons, 3 Ala. 497; State v. Girkin, 23 N. C. 121. Premeditation necessary in New York. Godfrey v. People, 63 N. Y. 207. Intent need not exist any length of time. Godfrey v. People, 63 N. Y. 207; Molette v. State, 49 Ala. 18; Slattery v. State, 41 Tex. 619.

[6] Terrell v. State, 86 Tenn. 523, 8 S. W. 212; People v. Wright, 93 Cal. 564, 29 Pac. 240.

[7] People v. Wright, 93 Cal. 564, 29 Pac. 240; State v. Evans, 2 N. C. 281; State v. Crawford, 13 N. C. 425.

of the states have statutes punishing the infliction of wounds less than mayhem.[8] It is said by Wharton that mayhem is a felony at common law, because anciently the offender had judgment for the loss of the same member as that the loss of which he occasioned to the sufferer.[9] It is not a felony at common law in Massachusetts, nor in Georgia, except in case of castration.[10]

RAPE

79. Rape is the having unlawful carnal knowledge by a man, of a woman forcibly without her consent,[11] as in the following cases:

(a) Where her resistance is overcome by actual force.

(b) Where no actual force is used, but because of her condition, known to the man, she cannot consciously consent.

(c) Where she is below the age, at common law or under statutes, at which she can consent.

(d) Where her consent is extorted by fear of immediate bodily harm.

(e) Where (according to some authorities) her submission is induced by fraud without her intelligent consent; as, where induced by fraud she submits to connection believed to be a surgical operation, or to connection with a man fraudulently impersonating and believed to be her husband.

80. Rape is a felony at common law and under the statutes.

[8] State v. Watson, 41 La. Ann. 593, 7 South. 125.

[9] 1 Whart. Cr. Law, § 583. And see 2 Bish. Cr. Law, § 1008.

[10] Com. v. Newell, 7 Mass. 245; Adams v. Barrett, 5 Ga. 404. And see Canada v. Com., 22 Grat. (Va.) 899; State v. Thompson, 30 Mo. 470; State v. Brown, 60 Mo. 141.

[11] 2 Bishop, Cr. Law, § 1115 (2).

Rape is generally defined as the act of having unlawful carnal knowledge of a woman by force and against her will;[12] but, as we shall see, the definition does not get us very far in determining what is and what is not rape. Force on the part of the man, and want of consent on the part of the woman, are in a sense essential elements of the crime of rape, but the force may be supplied by what is not force at all, and the woman may, under some circumstances, actually consent to the intercourse and it yet be rape. Even where such is the case, however, there is force in law, and there is want of consent in law. As was said in an English case, "the word 'forcibly' does not necessarily mean 'violently,' but with that description of force which must be exercised in order to accomplish the act."[13]

Consent—Actual Force

When actual force is employed, it must be such as to overcome resistance. If a woman is capable in the eye of the law of consenting to sexual intercourse, carnal knowledge of her with her consent is not rape, provided, however, as we shall presently see, her consent is not extorted by threats and fear of immediate bodily harm.[14] Under such circumstances, to constitute the crime of rape, it is said in some of the cases, she must resist to the uttermost.[15]

[12] 1 East, P. C. 434; 4 Bl. Comm. 210.

[13] Per May, C. J., Reg. v. Dee, L. R. 14 Ir. at page 476.

[14] Reg. v. Hallett, 9 Car. & P. 748.

[15] Oleson v. State, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366; State v. Burgdorf, 53 Mo. 65; DON MORAN v. PEOPLE, 25 Mich. 356, 12 Am. Rep. 283, Mikell Illus. Cas. Criminal Law, 133; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Conners v. State, 47 Wis. 523, 2 N. W. 1143; Strang v. People, 24 Mich. 1; Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856; People v. Morrison, 1 Parker, Cr. R. (N. Y.) 625; Whitney v. State, 35 Ind. 506; Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Taylor v. State, 50

Many cases lay down the rule without qualification.[16] The importance of resistance, however, is to show two elements of the crime—carnal knowledge by force, and nonconsent. The test of resistance to the limit of physical capacity is difficult, if not impossible, to apply; and it seems that if the resistance, although short of the extreme limit of which the woman is physically capable, is of such a character as clearly to show nonconsent, and is persisted in to the end the requirement is satisfied.[17] Where, from incapacity, there is no resistance, the mere force of penetration is sufficient. Opposition by mere words is not enough.[18] If the woman voluntarily gives her consent to the act, it is immaterial

Ga. 79; People v. Brown, 47 Cal. 447; O'Boyle v. State, 100 Wis. 296, 75 N. W. 989. The circumstances may show that no force was used; as, for instance, where a girl of 15, weighing 150 pounds, claims that she was raped by a boy weighing 115 pounds, while she was sitting on the top step of a steep stairway. Brown v. Com., 82 Va. 653. Failure to make outcry not alone enough to show want of resistance. Eberhart v. State, 134 Ind. 651, 34 N. E. 637. And see other cases cited.

[16] People v. Dohring, supra.

[17] "The importance of resistance is simply to show two elements of the crime—carnal knowledge by force * * * and nonconsent. * * * The jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the use of brutal force. So far resistance by the complainant is important and necessary; but to make the crime hinge on the uttermost exertion the woman was physically capable of making would be a reproach to the law as well as to common sense. * * * The fallacy lies in the assumption that the deficiency in such cases necessarily shows consent. If the failure to make extreme resistance was intentional, in order that the assailant might accomplish his purpose, it would show consent; but without such intent it shows nothing important whatever. The whole question is one of fact." State v. Shields, 45 Conn. 256; State v. Sudduth, 52 S. C. 488, 30 S. E. 408.

[18] Huber v. State, 126 Ind. 185, 25 N. E. 904.

how tardily it is given or how much force has previously been employed.[19] If rape is committed, subsequent condonation on the part of the woman is no defense.[20]

Same—Woman Incapable of Consent

In order that the woman's consent may prevent the act from being rape, her consent to the act of intercourse must be consciously given. The consent must be the act of the woman as a rational and intelligent being. It must proceed from the will, not when the will is acting without the control of reason, but from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being.[21] There is no consent in law if a woman is so drunk that she does not know what she is doing, and a man takes advantage of her unconscious condition to have carnal knowledge of her. Under such circumstances, he is regarded as accomplishing the act by force—the force being the force necessary for penetration—and without her consent.[22] So, also, where the woman is insane, or imbecile, or asleep;[23] but where she is merely weak-minded, and has sufficient

[19] Reynolds v. State, 27 Neb. 90, 42 N. W. 903, 20 Am. St. Rep. 659; Mathews v. State, 101 Ga. 547, 29 S. E. 424.

[20] State v. Newcomer, 59 Kan. 668, 54 Pac. 685; State v. Welsh, 191 Mo. 179, 89 S. W. 945, 4 Ann. Cas. 681. Ante, p. 9, note 26.

[21] Reg. v. Dee, L. R. 14 Ir. at page 487.

[22] Reg. v. Champlin, 1 Car. & K. 749; Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531. But see People v. Quin, 50 Barb. (N. Y.) 128. Cantharides cannot overcome woman's mental or physical power to resist. State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

[23] Reg. v. Fletcher, 8 Cox, Cr. Cas. 131; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Cunningham, 100 Mo. 382, 12 S. W. 376. Contra, Crosswell v. People, 13 Mich. 427, 87 Am. Dec. 774 (woman insane, but not idiot); Charles v. State, 11 Ark. 389; Com. v. Fields, 4 Leigh (Va.) 648. Carnal knowledge of a woman while she is asleep, by one other than her husband, is rape. Brown v. State, 138 Ga. 814, 76 S. E. 379.

mental capacity to know what she is doing, her consent prevents the act from being rape.[24] In these cases, however, the man must know the condition of the woman, and take advantage of it to carnally know her. The mere fact that her mental powers are so impaired that she is unconscious of the nature of the act will not make the act rape, if the man does not know her condition, and believes she is willingly submitting.[25] At common law, a child under the age of 10 years is deemed incapable of consenting, as she cannot know the nature of the act, and her consent is therefore no defense.[26] It has even been held that a girl of 12 is incapable of consenting at common law.[27] In most of the states there are statutes which fix an age below which a girl cannot consent to sexual intercourse, by providing that carnal knowledge of a female under that age shall be rape, whether she consents or not. Here, of course, consent is no defense.[28] In some states the age is fixed as high as 18 years.

[24] McQuirk v. State, 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381.

[25] Crosswell v. People, 13 Mich. 427, 87 Am. Dec. 774.

[26] People v. McDonald, 9 Mich. 150; Crosswell v. People, 13 Mich. 433, 87 Am. Dec. 774; Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747.

[27] Coates v. State, 50 Ark. 330, 7 S. W. 304; State v. Tilman, 30 La. Ann. 1249, 31 Am. Rep. 236; State v. Miller, 42 La. Ann. 1186, 8 South. 309, 21 Am. St. Rep. 418.

[28] Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747; Farrell v. State, 54 N. J. Law, 416, 24 Atl. 723; People v. Courier, 79 Mich. 366, 44 N. W. 571; People v. Goulette, 82 Mich. 36, 45 N. W. 1124; Proper v. State, 85 Wis. 615, 55 N. W. 1035; State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; State v. Lacey, 111 Mo. 513, 20 S. W. 238; State v. Wright, 25 Neb. 38, 40 N. W. 596; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Rodgers v. State, 30 Tex. App. 510, 17 S. W. 1077; Comer v. State (Tex. Cr. App.) 20 S. W. 547; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496.

Same—Fear

If a woman's consent to carnal intercourse is obtained by threats and fear of immediate bodily harm, the intimidation vitiates her consent, and supplies the place of force, and the act is rape.[29] Her consent must be voluntarily given. As said in a Michigan case, force is an essential element of the crime of rape, and the force contemplated is something more than that which is always essential to sexual intercourse when consented to. It is not limited, however, to the positive exertion of physical force in compelling submission, but includes any force or violence threatened as the result of noncompliance, and for the purpose of preventing resistance or extorting consent, and sufficient to create a real apprehension of dangerous consequences, or great bodily harm, or in any manner to overpower the mind of the victim so that she dare not resist.[30]

Same—Fraud

It is generally declared to be the rule that consent on the part of the woman, if voluntarily given, is a defense, except where she is in law deemed incapable of consenting, even though it was obtained by fraud.[31] Nevertheless, upon

[29] Reg. v. Woodhurst, 12 Cox, Cr. Cas. 443; Strang v. People, 24 Mich. 1; State v. Ward, 73 Iowa, 532, 35 N. W. 617; State v. Cunningham, 100 Mo. 382, 12 S. W. 376; Turner v. People, 33 Mich. 363; Huston v. People, 121 Ill. 497, 13 N. E. 538. If the woman is rendered insensible through fright, or ceases resistance under fear of great bodily harm, the consummated act is rape. Loescher v. State, 142 Wis. 260, 125 N. W. 459. Threats of future harm if the woman does not consent to intercourse are not sufficient to show that she acted under compulsion in consenting. People v. Crosby, 17 Cal. App. 518, 120 Pac. 441.

[30] DON MORAN v. PEOPLE, 25 Mich. 356, 12 Am. Rep. 283, Mikell Illus. Cas. Criminal Law, 133.

[31] Whittaker v. State, 50 Wis. 519, 7 N. W. 431, 36 Am. Rep. 856; Walter v. People, 50 Barb. (N. Y.) 144; People v. Royal, 53 Cal. 62;

the question how far submission procured by fraud is a defense, there is some conflict of authority. It has been held that, where a woman consents to intercourse with a man under the belief on his representations that an illegal marriage to him is legal, the man is not guilty of rape.[82] On the other hand, it has been held that a man commits rape if he fraudulently personates a woman's husband, and she submits to sexual intercourse believing that he is her husband, on the ground that there is no intelligent consent, the actual consent being to a connection with a different person.[83] The preponderance of authority is, however, to the contrary.[84]

The cases may however, be reconciled in principle, if not in result, by a consideration of the differing views of the courts as to what the "act" is. The general rule is that fraud, to vitiate consent, must be fraud as to the act itself, not a fraud as to some collateral fact. Those courts that hold that intercourse obtained by impersonation of the husband is not rape conceive of the act as the bare act of intercourse, and hold that the fraud involved in this class of case is a fraud, not as to that act, but as to the collateral matter of who was performing the act. The courts that hold that intercourse obtained by impersonation is rape give a

DON MORAN v. PEOPLE, 25 Mich. 356, 12 Am. Rep. 283, Mikell Illus. Cas. Criminal Law, 133.

[82] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

[83] Reg. v. Dee, 15 Cox, Cr. Cas. 579. See, also, State v. Shepard, 7 Conn. 54; Whart. Cr. Law, § 561.

[84] Reg. v. Barrow, L. R. 1 Cr. Cas. 156; Reg. v. Fletcher, 10 Cox, Cr. Cas. 248; Reg. v. Saunders, 8 Car. & P. 265; Wyatt v. State, 2 Swan (Tenn.) 394; Rex v. Jackson, Russ. & R. 486; Reg. v. Clarke, 6 Cox, Cr. Cas. 412; Lewis v. State, 30 Ala. 54, 68 Am. Dec. 113; DON MORAN v. PEOPLE, 25 Mich. 356, 12 Am. Rep. 283, Mikell Illus. Cas. Criminal Law, 133; State v. Brooks, 76 N. C. 1.

broader scope to the word "act." "She intends to consent to a lawful and marital act to which it is her duty to submit. But did she consent to an act of adultery? Are not the acts themselves wholly different in their moral nature? The act she permitted cannot properly be regarded as the real act which took place." [86]

In England and in some of the states carnal knowledge of a woman by personation of her husband is made rape by statute.[86] It is also rape for a physician to have carnal knowledge of a girl by fraudulently inducing her to believe that she is submitting to a surgical operation, on the ground that consent to an act of a wholly different character is not consent to sexual connection.[87] A distinction must be made between cases where the woman is induced to consent by being fraudulently told that she is submitting to a surgical operation or medical treatment, and those where she is induced to consent by being told that intercourse is necessary as medical treatment. In the former class of case she does not consent to intercourse at all, but to an operation or treatment, and as her consent is not to the act done, the act is rape. In the other class of case, she does consent to intercourse, and her consent prevents the act from being rape, even though such consent was obtained by fraud.[88]

[86] May, C. J., in Reg. v. Dee, 15 Cox, C. C. 587.

[86] See 48 & 49 Vict. c. 69, § 4; Mooney v. State, 29 Tex. App. 257, 15 S. W. 724; King v. State, 22 Tex. App. 650, 3 S. W. 342; Payne v. State, 38 Tex. Cr. R. 494, 43 S. W. 515, 70 Am. St. Rep. 757.

[87] Reg. v. Flattery, 13 Cox, Cr. Cas. 388; Reg. v. Stanton, 1 Car. & K. 415; Pomeroy v. State, 94 Ind. 96, 48 Am. Rep. 146. And see dictum to same effect, Crosswell v. People, 13 Mich. 427, 87 Am. Dec. 774; Eberhart v. State, 134 Ind. 654, 34 N. E. 637; State v. Nash, 109 N. C. 824, 13 S. E. 874.

[88] DON MORAN v. PEOPLE, 25 Mich. 356, 12 Am. Rep. 283, Mikell Illus. Cas. Criminal Law, 133. It is otherwise if the physician threatens and inspires fear of treatment likely to endanger life, and thereby obtains her consent. Id.

The Act

It is necessary to prove some penetration by the male organ, but the slightest penetration is sufficient, and it may be inferred from the circumstances.[39] There are authorities to the effect that proof of emission was necessary at common law,[40] but such is not the law, and in most of the states there are statutes making proof of emission unnecessary.[41]

The Woman

The fact that the woman is a common prostitute, or the man's mistress, does not make the act any the less rape, if force, actual or constructive, is used; for the carnal knowledge is unlawful, and forcible unlawful carnal knowledge of any woman is rape.[42] The fact, however, that the woman was a prostitute, or of unchaste character, may always be considered in determining whether she consented or not, as a prostitute would be more apt to consent than a chaste woman.[43] The intercourse must be unlawful. It is lawful for a husband to have carnal knowledge of his wife, and the

[39] Rex v. Gammon, 5 Car. & P. 321; Davis v. State, 42 Tex. 226; State v. Shields, 45 Conn. 256; Hardtke v. State, 67 Wis. 552, 30 N. W. 723; Taylor v. State, 111 Ind. 279, 12 N. E. 400; State v. Depoister, 21 Nev. 107, 25 Pac. 1000; State v. Dalton, 106 Mo. 463, 17 S. W. 700; Rodgers v. State, 30 Tex. App. 510, 17 S. W. 1077; People v. Courier, 79 Mich. 366, 44 N. W. 571; Ellis v. State, 25 Fla. 702, 6 South. 768; Bean v. People, 124 Ill. 576, 16 N. E. 656; Waller v. State, 40 Ala. 325; State v. Grubb, 55 Kan. 678, 41 Pac. 951.

[40] 1 Hale, P. C. 628; 1 Hawk. P. C. c. 41, § 1; 1 East, P. C. 437, 438.

[41] Ellis v. State, 25 Fla. 702, 6 South. 768; Blackburn v. State, 22 Ohio St. 102; State v. Hargrave, 65 N. C. 466; Waller v. State, 40 Ala. 325; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536.

[42] People v. Crego, 70 Mich. 319, 38 N. W. 281; Carney v. State, 118 Ind. 525, 21 N. E. 48; Pugh v. Com. (Ky.) 7 S. W. 541.

[43] State v. Reed, 39 Vt. 417, 94 Am. Dec. 337; People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; Woods v. People, 55 N. Y. 515, 14 Am.

fact that he uses force does not make him guilty of rape. He may, however, become guilty by aiding or counseling another to rape his wife, for he would then be a principal in the second degree or accessary before the fact to the other's crime.[44] The crime may be committed on a girl under the age of puberty.[45]

Who may Commit

We have just seen that a husband cannot commit a rape on his wife, but that he may be an accessary or a principal in the second degree. So, also, a woman, though it would be impossible for her to commit the crime herself, may be guilty as principal in the second degree or accessary, by aiding, abetting, or counseling a man in its commission.[46] A boy under fourteen is under the common law of England conclusively presumed incapable physically of committing the crime.[47] Such is also the law with us in some of the states.[48] Some courts, on the contrary, hold that the common-law rule is not applicable, and refuse to follow it, on the ground that, because of the difference in climate and other conditions, boys mature earlier in this

Rep. 309; McQuirk v. State, 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381.

[44] Strang v. People, 24 Mich. 13; People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; State v. Dowell, 106 N. C. 722, 11 S. E. 525, 8 L. R. A. 297, 19 Am. St. Rep. 568; State v. Haines, 51 La. Ann. 731, 25 South. 372, 44 L. R. A. 837.

[45] 1 Hale, P. C. 630.

[46] State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; Kessler v. Com., 12 Bush (Ky.) 18. See, also, State v. Hairston, 121 N. C. 579, 28 S. E. 492.

[47] Reg. v. Phillips, 8 Car. & P. 736; Reg. v. Waite, L. R. 2 Q. B. 600.

[48] Com. v. Green, 2 Pick. (Mass.) 380; McKinny v. State, 29 Fla. 565, 10 South. 732, 30 Am. St. Rep. 140; Foster v. Com., 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. Rep. 846; Chism v. State, 42 Fla. 232, 28 South. 399.

country than in England.[49] Other courts hold that the common-law rule applies so far as it raises a presumption of incapacity, but that the presumption is not conclusive, and may be rebutted.[50] A boy under fourteen, if of sufficient mental capacity, may, however, be guilty as principal or accessary to the crime committed by another.[51] We have already considered in another connection the question whether a boy who is too young to commit rape may be guilty of an attempt to commit it.[52]

ASSAULT AND BATTERY

81. An assault is an unlawful attempt, or offer, with force and violence, to do a corporal hurt to another,[53] and is either

(a) Common assault; that is, where there are no aggravating circumstances, or

(b) Aggravated assault; that is, where there are aggravating circumstances.

[49] State v. Jones, 39 La. Ann. 935, 3 South. 57.

[50] Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592; Heilman v. Com., 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; People v. Randolph, 2 Parker, Cr. R. (N. Y.) 174; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36; Davidson v. Com. (Ky.) 47 S. W. 213.

[51] Law v. Com., 75 Va. 885, 40 Am. Rep. 750; 1 Hale, P. C. 630.

[52] Ante, p. 147.

[53] "An assault is an unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being." 2 Bish. New Cr. Law, § 23. "An assault is an apparent attempt, by violence, to do corporal hurt to another." 1 Whart. Cr. Law, § 603. "An intentional attempt to strike within striking distance, which fails of its intended effect, either by preventive interference or by misadventure." Lane v. State, 85 Ala. 11, 4 South. 730. "An assault is an attempt or offer, with force and violence, to do a corporal hurt to another, as by striking at another

82. A battery is an assault whereby any force, however slight, is actually applied to the person of another, directly or indirectly.[54]

83. There must, to constitute a criminal assault, be at least an apparent present ability to commit the battery. Some courts hold an apparent present ability sufficient, while others require an actual ability.

An assault has generally been defined as an attempt, or offer, with force or violence, to do a corporal hurt to another.[55] Some authorities, on the other hand, maintain that a mere attempt does not constitute an assault, but that there must be an act of a nature to put the person assailed in reasonable fear of bodily injury.[56] If this view is correct, there is little or no distinction between a criminal and a civil assault.[57] It seems, however, that the definition of criminal assault should include attempts as well as acts of a nature to give the person assailed reasonable ground to believe that the actor means to apply physical force to his person.[58]

with a stick or other weapon, or without a weapon, though the party striking misses his aim. So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault." 1 Russ. Crimes, 1019.

[54] Steph. Dig. Cr. Law, art. 241.

[55] Hawk. P. C. c. 15, § 1; 1 Russ. Crimes, 1019, note.

[56] Bish. New Cr. Law, § 23.

[57] Jagg. Torts, 431.

[58] "An assault is (a) an attempt unlawfully to apply any the least actual force to the person of another, directly or indirectly; (b) the act of using a gesture toward another, giving him reasonable grounds to believe that the person using that gesture means to apply such

Regarded as an attempt, an assault is an attempt to commit a battery, and the principles of law in reference to attempts generally are applicable. In treating of attempts, we considered the necessity for an overt act, and it is not necessary to go over again what was there said. It is sufficient to say that an overt act is also essential to an assault, and that the force intended to be applied must be put in motion; otherwise, there is merely an intention, and not an attempt, to inflict the battery.[59] Mere preparations or mere words and threats, whatever may be the intention, can never amount to an assault; there must be some act which, if not stopped, may apparently, or, as held in some jurisdictions, actually, produce injury.[60] Though an actual touching of the person assaulted is necessary to constitute a battery, it is not necessary to constitute an assault.[61] If one raises his cane or fist at another in a threatening manner, so as to create a reasonable apprehension that he will strike, or if a person strikes or spits at another, and misses him, there is an assault.[62] It has been held in Virginia that ap-

actual force to his person as aforesaid; (c) the act of depriving another of his liberty,—in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud." Steph. Dig. Cr. Law, art. 241.

[59] People v. Yalas, 27 Cal. 630; Smith v. State, 39 Miss. 521; State v. Davis, 23 N. C. 125, 35 Am. Dec. 735; State v. Mooney, 61 N. C. 434; Balkum v. State, 40 Ala. 671.

[60] People v. Lilley, 43 Mich. 521, 5 N. W. 982; Cutler v. State, 59 Ind. 300; Lawson v. State, 30 Ala. 14; State v. Milsaps, 82 N. C. 549; State v. Painter, 67 Mo. 84.

[61] Hays v. People, 1 Hill (N. Y.) 351.

[62] 4 Bl. Comm. 120; STATE v. MORGAN, 25 N. C. 186, 38 Am. Dec. 714, Mikell Illus. Cas. Criminal Law, 107; State v. Baker, 65 N. C. 332; U. S. v. Hand, 2 Wash. C. C. 435, Fed. Cas. No. 15,297; U. S. v. Ortega, 4 Wash. C. C. 535, Fed. Cas. No. 15,971. It has been held that if a man, without the consent of a woman and by the use of force, attempts to kiss her, he is guilty of an assault; but where he

proaching a person with menaces and gesticulations is not an assault if there is no attempt to strike.[63]

Firing a pistol in the direction of another is an assault.[64] If a person, by means of threats, is stopped and prevented from passing along a public highway, he is assaulted,[65] and it has been held in North Carolina that if a person is at a place where he has a right to be, and several other persons, armed with pitchforks and guns, by following him and using threatening and insulting language, put him in fear, and induce him to go home sooner than he would have gone, or by a different way, they are guilty of an assault, though they do not get nearer than 75 yards, and do not take the weapons from their shoulders.[66] A man may also commit an assault by threatening a battery, and offering to inflict it unless conditions named by him are complied with;[67] as, for instance, where a man, while taking off another's property, faces the owner with a cocked gun in his hand, and his finger on the trigger, but without pointing it, and says

reasonably believes under the circumstances that she would allow him to kiss her, and merely attempts to kiss her by consent, intending no force, he is not guilty of an assault. Stripling v. State, 47 Tex. Cr. R. 117, 80 S. W. 376.

[63] Berkeley v. Com., 88 Va. 1017, 14 S. E. 916. Drawing weapon with threat to use it is an assault, though it is not pointed. People v. McMakin, 8 Cal. 547; State v. Church, 63 N. C. 15.

[64] In Edwards v. State, 4 Ga. App. 849, 62 S. E. 565, it was held that shooting a pistol in the direction of the prosecutor, within carrying distance, was an assault, though accused intended only to frighten the prosecutor, and not to strike him.

[65] Bloomer v. State, 3 Sneed (Tenn.) 66.

[66] State v. Rawles, 65 N. C. 334. And see State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; State v. Shipman, 81 N. C. 513; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496.

[67] Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; U. S. v. Myers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845; State v. Church, 63 N. C. 15.

that he will kill any one who interferes, and lays hands on the property;[68] or where a man raises an axe, and tells another he will strike him if he does not do a certain thing.[69] To administer poison or other injurious drugs will constitute an assault and battery, and it is immateral that the person so assaulted takes the drug himself, where he does not know its nature; since, "although force and violence are included in all definitions of assault or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts."[70] Exposure of an unconscious child is also an assault.[71]

Battery

Assault and battery is an offense distinct from assault.[72] As we have seen, an assault is an attempt to apply unlawful force to the person of another, or to commit a battery. The battery is the application of the force. It makes no difference how trifling the force may be, so long as it is unlawful.[73] Every touching or laying hold of the person of an-

[68] State v. Horne, 92 N. C. 805, 53 Am. Rep. 442.

[69] STATE v. MORGAN, 25 N. C. 186, 38 Am. Dec. 714, Mikell Illus. Cas. Criminal Law, 107. See also State v. Reavis, 113 N. C. 677, 18 S. E. 388.

[70] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350; Johnson v. State, 92 Ga. 36, 17 S. E. 974; Reg. v. Button, 8 Car. & P. 660 (but see Reg. v. Hanson, 2 Car. & K. 912); State v. Glover, 27 S. C. 602, 4 S. E. 564; Carr v. State, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. Rep. 408. Communicating venereal disease, Reg. v. Bennett, 4 Fost. & F. 1105; Reg. v. Sinclair, 13 Cox, Cr. Cas. 28.

[71] Reg. v. March, 1 Car. & K. 496.

[72] Moore v. People, 26 Ill. App. 137.

[73] Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410. Where a milkman, against the express commands of one of his customers, entered the latter's sleeping room in the early morning, took hold

other, or his clothes,[74] in an angry, revengeful, rude, insolent, or hostile manner, is a battery.[75] It is a battery to spit on another, to push him angrily out of the way, to put a dog on him which actually bites or even touches him, or to inflict injury by administering poisonous or injurious drugs.[76] To spit at a person and miss him, or to set a dog on him which does not touch him, would be an assault, but not a battery. An assault may not result in a battery, but every battery necessarily includes an assault.[77] If the force is not applied, there is an assault only; if it is applied, there is an assault and battery. It is immaterial whether that which causes the injury acts upon the person injured externally or internally, by mechanical or chemical force.[78] The force may be applied directly or indirectly. Thus, one who whips a horse, and makes him run away with the rider, or seizes the horses attached to a carriage, and turns them around, commits a battery, and consequently an assault, upon the rider or driver.[79]

Aggravated Assaults—Assaults with Specific Intent

Aggravated assaults are those which are accompanied by circumstances of aggravation; such as assaults with intent

of his arms and shoulders, and used sufficient force to awaken him, for the purpose of presenting his bill, he was held guilty. Richmond v. Fisk, 160 Mass. 34, 35 N. E. 103.

[74] Reg. v. Day, 1 Cox, Cr. Cas. 207.

[75] 1 Russ. Crimes, 1020; 3 Bl. Comm. 120.

[76] 1 Russ. Crimes, 1020.

[77] Johnson v. State, 17 Tex. 515; State v. Baker, 65 N. C. 332.

[78] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350 (administering deleterious drug by deceit); Reg. v. Button, 8 Car. & P. 660 (Spanish flies); Carr v. State, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. Rep. 408 (poison). Contra, Reg. v. Hanson, 2 Car. & K. 912.

[79] People v. Moore, 50 Hun (N. Y.) 356, 3 N. Y. Supp. 159. See, also, Steph. Dig. Cr. Law, art. 241, note 2. Cf. Kirland v. State, 43 Ind. 146, 13 Am. Rep. 386.

to kill, to rape, or to inflict serious bodily injury. In such cases the assault, though only a misdemeanor, like a common assault, and not a distinct crime, at common law,[80] is even at common law regarded as aggravated, and punished more severely where the punishment is within the discretion of the court or jury.[81] There are now in all of the states statutes making assaults with intent to commit certain specific crimes substantive offenses, distinct from common assault, and in many cases the offenses are felonies. Thus, there are statutes punishing assaults with intent to kill; assaults with a dangerous or a deadly weapon;[82] as-

[80] Hall v. State, 9 Fla. 203, 76 Am. Dec. 617; Wilson v. People, 24 Mich. 410; Wright v. People, 33 Mich. 300; Cornelison v. Com., 84 Ky. 583, 2 S. W. 235; Jackson v. State, 49 N. J. Law, 252, 9 Atl. 740.

[81] 2 Bish. Cr. Law, §§ 42-54; Cornelison v. Com., 84 Ky. 583, 2 S. W. 235.

[82] What constitutes a deadly weapon, U. S. v. Small, 2 Curt. 241, Fed. Cas. No. 16,314; iron two-pound weight, Bilge v. State, 20 Fla. 742, 51 Am. Rep. 628; gun or pistol used as instrument to strike with, Shadle v. State, 34 Tex. 572; Skidmore v. State, 43 Tex. 93; Pierce v. State, 21 Tex. App. 540, 1 S. W. 463; Jenkins v. State, 30 Tex. App. 379, 17 S. W. 938; unloaded gun, State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830; State v. Yturaspe, 22 Idaho, 360, 125 Pac. 802; Territory v. Gomez, 14 Ariz. 139, 125 Pac. 702, 42 L. R. A. (N. S.) 975; sledge hammer, Philpot v. Com., 86 Ky. 595, 6 S. W. 455; chair, Kouns v. State, 3 Tex. App. 13; stick, People v. Comstock, 49 Mich. 330, 13 N. W. 617; Stevens v. State, 27 Tex. App. 461, 11 S. W. 459; clubs, State v. Phillips, 104 N. C. 786, 10 S. E. 463; chisel, Com. v. Branham, 8 Bush (Ky.) 387; piece of timber, State v. Alfred, 44 La. Ann. 582, 10 South. 887; pocketknife, Sylvester v. State, 71 Ala. 17; State v. Scott, 39 La. Ann. 943, 3 South. 83; stone, Com. v. Duncan, 91 Ky. 592, 16 S. W. 530; fence pole, Wilson v. State, 15 Tex. App. 150; pitchfork handle, used as club, not a "sharp, dangerous" weapon, Filkins v. People, 69 N. Y. 101 25 Am. Rep. 143; pitchfork a deadly weapon, Evans v. Com. (Ky.) 12 S. W. 767; razor, State v. Nelson, 38 La. Ann. 942, 58 Am. Rep. 202. Judicial notice that ax is deadly, Dollarhide v. U. S., Morris (Iowa) 233, 39 Am. Dec. 460; State v. Ostrander, 18 Iowa, 456; State v. Shields, 110 N. C. 497, 14 S. E. 779; contra, Gladney v. State

saults with intent to commit rape; assaults with intent to rob; and assaults with other intents not necessary to be specially mentioned. To constitute these crimes, the specific intent is absolutely essential. A man cannot be convicted of an assault with intent to kill unless it is shown that he intended to kill.[83] In some states it is made a crime to assault another with intent to murder, and this is an altogether different crime from assault with intent to kill.[84] Evidence that the assailant intended such killing only as would amount to manslaughter will support an indictment for assault with intent to kill,[85] or to commit manslaugh-

(Tex. App.) 12 S. W. 868; Melton v. State, 30 Tex. App. 273, 17 S. W. 257; also as to loaded pistol and hoe, Hamilton v. People, 113 Ill. 38, 55 Am. Rep. 396; and as to brickbat, People v. Fahey, 64 Cal. 342, 30 Pac. 1030. Loaded pistol and brass knuckles not necessarily deadly, Ballard v. State (Tex. App.) 13 S. W. 674. Question for jury, People v. Leyba, 74 Cal. 407, 16 Pac. 200. In a prosecution for an assault with a deadly weapon with intent to kill, the jury may find the instrument to be a deadly weapon within the meaning of the law only where they believe the instrument to be such as was reasonably calculated to produce death when used by a person of defendant's strength and in the manner in which it was used by him. Cosby v. Com., 115 Ky. 221, 72 S. W. 1089.

[83] Intent to do bodily injury likely to cause death not enough. Carter v. State, 28 Tex. App. 355, 13 S. W. 147; Moore v. State, 26 Tex. App. 322, 9 S. W. 610. Contra, Smith v. State, 88 Ala. 23, 7 South. 103; Ex parte Brown (C. C.) 40 Fed. 81. Presenting gun within shooting distance without shooting does not warrant finding of intent to shoot or kill, but rather the reverse. Davis v. State, 25 Fla. 272, 5 South. 803. Intent inferred from shooting, State v. Elvins, 101 Mo. 243, 13 S. W. 937; State v. Dill, 9 Houst. (Del.) 495, 18 Atl. 763; or use of deadly weapon, State v. Doyle, 107 Mo. 36, 17 S. W. 751; Jackson v. State, 94 Ala. 85, 10 South. 509. Shooting at one person with intent to kill him, and hitting another, is an assault with intent to kill the latter. On this point, see, also, ante, pp. 58–59.

[84] Hall v. State, 9 Fla. 203, 76 Am. Dec. 617.

[85] Ex parte Brown (C. C.) 40 Fed. 81.

ter;[86] but, to support an indictment for assault with intent to murder, it must be shown that such a killing was intended as would amount to murder.[87] So, also, in case of assault with intent to commit rape, it must be shown that there was an intention to have intercourse by means that would make the act rape, and it must therefore be shown that there was an intent to overcome resistance by force, or its equivalent,[88] and to penetrate the woman's person.[89]

[86] State v. Connor, 59 Iowa, 357, 13 N. W. 327, 44 Am. Rep. 686; Hall v. State, 9 Fla. 203, 76 Am. Dec. 617; State v. Brady, 39 La. Ann. 687, 2 South. 556; Brown v. State, 111 Ind. 441, 12 N. E. 514; State v. Postal, 83 Iowa, 460, 50 N. W. 207; Spivey v. State, 30 Tex. App. 343, 17 S. W. 546; State v. McGuire, 87 Iowa, 142, 54 N. W. 202; State v. Stone, 88 Iowa, 724, 55 N. W. 6; State v. White, 45 Iowa, 325. Some courts hold that there cannot be an assault with intent to commit manslaughter. People v. Lilley, 43 Mich. 521, 5 N. W. 982. No such offense as assault with intent to commit involuntary manslaughter. Stevens v. State, 91 Tenn. 726, 20 S. W. 423.

[87] Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; State v. Butman, 42 N. H. 490; Davis v. State, 79 Ga. 767, 4 S. E. 318; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; People v. Scott, 6 Mich. 287; Wilson v. People, 24 Mich. 410; Bonfanti v. State, 2 Minn. 123 (Gil. 99). Actual intent to kill necessary. Walls v. State, 90 Ala. 618, 8 South. 680; Felker v. State, 54 Ark. 489, 16 S. W. 663. Intent may be inferred from act, Conn v. People, 116 Ill. 460, 6 N. E. 463; Crosby v. People, 137 Ill. 325, 27 N. E. 49; as in case of stabbing, Jeff's Case, 39 Miss. 593. Use of deadly weapon not necessary. Monday v. State, 32 Ga. 672, 79 Am. Dec. 314. The law does not presume intent from use of deadly weapon. Patterson v. State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152; Gilbert v. State, 90 Ga. 691, 16 S. E. 652; Gallery v. State, 92 Ga. 463, 17 S. E. 863. As to what is sufficient to show intent, see People v. Comstock, 49 Mich. 330, 13 N. W. 617; Weaver v. People, 132 Ill. 536, 24 N. E. 571. Assault with intent to murder not necessarily committed whenever the killing, if it should result, would be murder. State v. Evans, 39 La. Ann. 912, 3 South. 63.

[88] Com. v. Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336; Milton v. State, 23 Tex. App. 204, 4 S. W. 574; Barr v. People, 113 Ill. 473;

[89] See note 89 on following page.

Since force and want of consent are not necessary to constitute rape of girls under ages specified in the statutes against intercourse with girls under a certain age, whether they consent or not, it is not necessary, on prosecutions for assault with intent to rape in such case, to show an intent to use force, and it is no defense to show that the girl consented to the assault.[89] An assault being an attempt to commit a

State v. Kendall, 73 Iowa, 255, 34 N. W. 843, 5 Am. St. Rep. 679; State v. Powell, 106 N. C. 635, 11 S. E. 191; Brown v. State, 27 Tex. App. 330, 11 S. W. 412; Langan v. State, 27 Tex. App. 498, 11 S. W. 521; People v. Manchego, 80 Cal. 306, 22 Pac. 223; State v. Nash, 109 N. C. 824, 13 S. E. 874; People v. Kirwan, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 160; Pefferling v. State, 40 Tex. 486. Attempt to have intercourse with woman while asleep, Maupin v. State (Ark.) 14 S. W. 924; Harvey v. State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229; State v. Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; Com. v. Fields, 4 Leigh (Va.) 648. Need not actually touch woman, Jackson v. State, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25. The fact that a man ran after a woman, calling out to her to stop, until she was within sight of a house, was held sufficient to sustain finding of intent to rape; but the case is a doubtful one, and aroused much adverse criticism at the time it was rendered. State v. Neely, 74 N. C. 425, 21 Am. Rep. 496. See State v. Massey, 86 N. C. 658, 41 Am. Rep. 478, disapproving State v. Neely. What acts sufficient to show intent to rape, State v. Boon, 35 N. C. 244, 57 Am. Dec. 555; Norris v. State, 87 Ala. 85, 6 South. 371; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Com. v. Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336; Carroll v. State, 24 Tex. App. 366, 6 S. W. 190; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; State v. Daly, 16 Or. 240, 18 Pac. 357; Green v. State, 67 Miss. 356, 7 South. 326; Harvey v. State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229; Jones v. State, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850; Moore v. State, 79 Wis. 546, 48 N. W. 653; State v. Owsley, 102 Mo. 678, 15 S. W. 137; People v. Fleming, 94 Cal. 308, 29 Pac. 647; Robertson v. State, 30 Tex. App. 498, 17 S. W. 1068; State v. Chapman, 88 Iowa, 254, 55 N. W. 489. Administering cantharides does not show intent to rape. State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

[89] McGee v. State, 21 Tex. App. 670, 2 S. W. 890.

[90] Post, p. 276.

battery, it necessarily follows that an assault with intent to commit a specific kind of battery, amounting to a crime, such as murder or rape, is an attempt to commit that crime.[91] The principles of law applicable to attempts are also applicable here, and the cases there cited are in point here. By statute, in Texas an assault on a female by an adult male is declared an aggravated assault.[92]

Intent

Neither the courts nor the text-writers are in agreement as to the intent necessary to constitute an assault. Some hold that to make the offer or attempt at violence an assault it is not necessary that there be any intent to do bodily harm; that it is sufficient if the person who is the object of the attack is put in fear of such harm.[93] Others hold such intent to be essential, and that in the absence of such intent the crime of assault is not committed.[94] For several reasons the latter rule seems to be the correct one. In the first place crimes are usually considered subjectively, not

[91] Contra under statutes of Texas, California, and probably of other states. Taylor v. State, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656; Milton v. State, 23 Tex. App. 204, 4 S. W. 574; Melton v. State, 24 Tex. App. 284, 6 S. W. 39; People v. Gardner, 98 Cal. 127, 32 Pac. 880.

[92] Galbraith v. State (Tex. App.) 13 S. W. 607; Kemp v. Same, 25 Tex. App. 589, 8 S. W. 804.

[93] 2 Bishop, Cr. Law (8th Ed.) § 32; 2 Whart. Cr. Law (11th Ed.) § 800; People v. Morehouse, 53 Hun, 638, 6 N. Y. Supp. 763; State v. Archer, 8 Kan. App. 737, 54 Pac. 927; Price v. U. S., 156 Fed. 950, 85 C. C. A. 247, 15 L. R. A. (N. S.) 1272, 13 Ann. Cas. 483; Com. v. White, 110 Mass. 407; State v. Shepard, 10 Iowa, 126.

[94] Rex v. James, 1 Car. & K. 530; CHAPMAN v. STATE, 78 Ala. 463, 56 Am. Rep. 42, Mikell Illus. Cas. Criminal Law, 140; People v. Dodel, 77 Cal. 293, 19 Pac. 484; Klein v. State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354; State v. Sears, 86 Mo. 169; State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830; State v. Edge, 1 Strob. (S. C.) 91.

objectively—the state of mind of the accused is the important consideration, not the state of mind of the person injured. Therefore the test should be the intent of the accused, not the fear of injury of the victim of the alleged assault.[95] Secondly, as we have seen, it is a general principle of law that there is no crime unless intent accompanies the act.

Again, assault is generally considered as an attempt to commit a battery; and in attempts to commit crimes we have seen it is universally held that an intent to commit the crime is an essential element.[96] The doctrine that intent to injure is not necessary if the victim is put in fear seems due to two considerations: First, that an act of defendant which puts the victim in fear justifies the victim in repelling the force with which he is menaced. The victim may excuse himself for the use of force in such a case, but it is not because the accused is guilty of assault; it is on the ground of mistake of fact.[97] The other source of this doctrine is the custom of the courts in citing civil cases of assault in criminal cases, and vice versa, and arguing from one to the other. It may well be that one who has suffered from the act of another may be entitled to recover damages from that other in a civil action, whether there was any intent to harm or not. Such civil action would rest upon the invasion of a

[95] Larceny is committed because the taker had the intent to steal, not because the victim thinks he is robbed; burglary is only committed if the intruder entered with intent to commit a felony, not when, in the absence of such intent, the householder is put in fear by an entry with some other intent.

[96] Mr. Bishop (volume 2, § 23, note) offers as a correct definition of assault: "Any indictable attempt to commit a battery." Yet he lays down the rule that no intent to commit a battery is necessary, it being sufficient if the victim was put in fear. Id. § 32.

[97] Supra, pp. 81, 90.

person's "right to live in society without being put in fear of personal harm." [88]

But it does not follow from this that a criminal assault has been committed. Thus it has been held in Alabama,[89] Oregon,[1] Indiana,[2] and Missouri,[3] that it is not a criminal assault to point at a person a gun which is unloaded, and which the person pointing it knows to be unloaded, since there is no intent to commit a battery. The contrary has been held in New York,[4] Massachusetts,[5] Iowa,[6] and the federal courts.[7] In England the cases are conflicting.[8] All courts agree that where there is neither an intention to commit a battery nor fear of such battery on the part of the person menaced there is no assault. Thus, where one raised and shook his cane at another, saying, "If you were not an old man, I would knock you down," it was held there was no assault.[9]

[88] Somerville, J., in CHAPMAN v. STATE, 78 Ala. 463, 56 Am. Rep. 42, Mikell Illus. Cas. Criminal Law, 140.

[89] CHAPMAN v. STATE, 78 Ala. 463, 56 Am. Rep. 42, Mikell Illus. Cas. Criminal Law, 140.

[1] State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830.

[2] Klein v. State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354.

[3] State v. Sears, 86 Mo. 169.

[4] People v. Morehouse, 53 Hun, 638, 6 N. Y. Supp. 763.

[5] Com. v. White, 110 Mass. 407.

[6] State v. Shepard, 10 Iowa, 126.

[7] Price v. U. S., 156 Fed. 950, 85 C. C. A. 247, 15 L. R. A. (N. S.) 1272, 13 Ann. Cas. 483.

[8] See Rex v. St. George, 9 Car. & P. 483; Reg. v. James, 1 Car. & K. 530.

[9] State v. Crow, 23 N. C. 375; or to raise one's hand against another, and say, "If it were not for your gray hairs, I would tear your heart out," Com. v. Eyre, 1 Serg. & R. (Pa.) 347; or to lay one's hand on his sword, and say, "If it were not assize time, I would not take such language from you," Tuberville v. Savage, 1 Mod. 3. And see Johnson v. State, 35 Ala. 363. But see State v. Hampton, 63 N. C. 13.

Present Ability

Closely connected with the question of intent is the question of present ability to commit harm; and here, as in the case of intent, there is the same conflict of authority. Some courts hold that there is no assault unless there is a present ability to inflict harm.[10] Other courts, on the contrary, and modern text-books of the highest authority, hold that an actual present ability to inflict the injury is not necessary; that it is sufficient if there is a reasonably apparent present ability, so as to create an apprehension that the injury may be inflicted, and cause the person threatened to resort to measures of self-defense, or to retreat or go out of his way to avoid it, though the assailant may not get within striking distance, and may not be actually able to injure.[11]

[10] 1 Russ. Crimes, 1019; 2 Green, Cr. Rep., and note page 271; Reg. v. James, 1 Car. & P. 530; McConnell v. State, 25 Tex. App. 329, 8 S. W. 275; Ware v. State, 24 Tex. App. 521, 7 S. W. 240. So, also, in California, People v. Dodel, 77 Cal. 293, 19 Pac. 484; in Indiana, Klein v. State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354; CHAPMAN v. STATE, 78 Ala. 463, 56 Am. Rep. 42, Mikell Illus. Cas. Criminal Law, 140; State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830. Contra, State v. Smith, 2 Humph. (Tenn.) 457; Com. v. White, 110 Mass. 407; State v. Shepard, 10 Iowa, 126; People v. Morehouse, 53 Hun, 638, 6 N. Y. Supp. 763; Reg. v. St. George, 9 Car. & P. 483. And see Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373. Firing gun loaded so that it cannot injure not an assault. State v. Swails, 8 Ind. 524, 65 Am. Dec. 772 (since overruled by Kunkle v. State, 32 Ind. 220); Henry v. State, 18 Ohio, 32. See, also, ante, p. 145, note 26. Pointing an unloaded gun at another, accompanied by a threat to discharge it, does not constitute an assault; nor does it constitute an assault if the gun is loaded, but there is no attempt to discharge it. People v. Sylva, 143 Cal. 62, 76 Pac. 814.

[11] 2 Bish. New Cr. Law, § 32; 1 Whart. Cr. Law, § 606; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; Kunkle v. State, 32 Ind. 220; State v. Rawles, 65 N. C. 334; State v. Shipman, 81 N. C. 513; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496; State v. Hampton, 63 N. C. 13; Cowley v. State, 10 Lea (Tenn.) 282; Morton v. Shoppoe, 3 Car. & P. 373; Stephens v. Myers, 4 Car. & P. 349; People v. Yslas, 27

It has repeatedly been held that to run after a person in such a threatening manner as to put him in reasonable fear, and cause him to retreat to avoid the supposed danger, is an assault; and in such cases it is immaterial whether the assailant gets near enough to inflict injury or not.[12] It has also been held that for a person to administer a drug which he has been informed will produce death is an assault with intent to kill, though the drug may be harmless,[13] and that impotency is no defense in a prosecution for an assault with intent to rape unless defendant knew he was impotent.[14] It is possible that some of the courts which seem to require actual intention and ability to injure would hold a man guilty of an assault if he has the intention to inflict the injury, and thinks he has the present ability to inflict it, as, for instance, where a person, aiming an unloaded gun at another, thinks it is loaded, and intends to shoot; for in such case there is a criminal intention and an overt act, which, as we have seen, is all that is required before the law may proceed to punish.[15] In some states an actual pres-

Cal. 630; State v. Davis, 23 N. C. 128, 35 Am. Dec. 735; Thomas v. State, 99 Ga. 38, 26 S. E. 748; State v. Archer, 8 Kan. App. 737, 54 Pac. 927; Malone v. State, 77 Miss. 812, 26 South. 968. Aiming gun from distance from which it will not carry, an assault, Tarver v. State, 43 Ala. 354; Smith v. State, 32 Tex. 593. Firing gun not sufficiently loaded to injure, Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691. See, also, ante, p. 145, note 25. Defendant from ambush pointed a gun at the prosecutor, but dropped it before the latter knew that it had been leveled at him. There was no evidence to show whether the gun was loaded or unloaded. It was held that if the gun was unloaded this was not an assault, as the prosecutor was not put in fear. State v. Barry, 45 Mont. 598, 124 Pac. 775, 41 L. R. A. (N. S.) 181.

[12] State v. Rawles, 65 N. C. 334; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; State v. Shipman, 81 N. C. 513.

[13] State v. Glover, 27 S. C. 602, 4 S. E. 564.

[14] Territory v. Keyes, 5 Dak. 244, 38 N. W. 440.

[15] Where a person shot at a hole in the roof of his house, thinking

ent ability to inflict the injury intended is made necessary by statute.[16]

There must be at least an apparent present intention and ability to inflict the injury. Thus, to raise one's cane or fist in a threatening manner, or aim a gun, at another, when, by reason of the distance between the parties, it is evident that no injury can possibly be inflicted, would not be an assault.[17] Some evil intent is necessary in all crimes; therefore, if there be no such intent, or something equivalent thereto—such as negligence—there can be no assault or assault and battery. Hence the touching of another, by accident, without negligence, in the performance of a lawful act, is not a battery; as when a soldier accidentally hurts another in discharging his gun in a sham battle,[18] or a horse bolts with his rider and strikes a pedestrian.[19]

But negligence is said to supply intent in those crimes

a policeman was watching there, and intending to kill the policeman, he was held guilty of assault under a statute defining assault to be "an unlawful attempt coupled with a present ability, to commit a violent injury upon the person of another." The court said: "The appellant had the present ability to inflict the injury. * * * That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part; neither did the officer escape by reason of the fact of his being so far distant that the deadly missile could do him no harm. He was sufficiently near to be killed from a bullet from the pistol, and his antagonist fired with the intent of killing him." Garoutte, J., in People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165; see, also, State v. Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. Rep. 763.

[16] Pratt v. State, 49 Ark. 179, 4 S. W. 785; McCullough v. State, 24 Tex. App. 128, 5 S. W. 839; People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27.

[17] Tarver v. State, 43 Ala. 354; Smith v. State, 32 Tex. 593; McKay v. State, 44 Tex. 43.

[18] Weaver v. Ward, Hob. 134.

[19] Gibbons v. Pepper, 4 Mod. 405.

which by their definition do not require a specific intent for their commission.[20] Therefore, whether one can be guilty of assault and battery by negligence in performing a lawful act depends on whether this crime requires a specific intent to injure. There is little direct authority on this question, but what authority there is seems to hold that negligence will supply the necessary intent.[21]

Constructive Intent

We have seen that when a person is engaged in the commission of a crime the intent to do that crime is carried over to an accidental act done by him, and supplies the intent necessary to make the second act a crime, if the latter crime is one that does not require a specific intent.[22] Whether a battery can be committed by an accidental striking done while the accused was in the commission of another crime depends, therefore, as we have just seen in cases of negligence, on whether a battery requires specific intent. It has been held that a battery may be thus committed. Thus, where one shot at A. and accidentally struck B., he was held guilty of a battery on B.[23] But to make one guilty under this doctrine the crime intended by him must be one malum in se, and not merely malum prohibitum.[24]

[20] See ante, p. 59.

[21] See REG. v. LATIMER, 16 Cox, C. C. 70, Mikell Illus. Cas. Criminal Law, 31; Com. v. Hawkins, 157 Mass. 551, 32 N. E. 862. Statutes in some states make the specific intent to injure an element of the offense. See Pen. Code Tex. art. 484.

[22] Supra, p. 56.

[23] McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; Callahan v. State, 21 Ohio St. 306.

[24] COM. v. ADAMS, 114 Mass. 323, 19 Am. Rep. 362, Mikell Illus. Cas. Criminal Law, 30. Discharging pistol in violation of city ordinance. Com. v. Hawkins, 157 Mass. 551, 32 N. E. 862. One who throws a stone in sport and injures another is guilty. Hill v. State,

Justification and Excuse

To constitute a criminal assault or assault and battery, the attempt to apply force, or the application of force, must be unlawful; that is, it must be without legal justification or excuse, either because there is no right to apply any force at all, or because the force applied is unreasonable in extent.[25] Whatever would justify or excuse a person in taking another's life would, of course, excuse or justify him in an assault and battery, or an assault with intent to kill; therefore, what has been said about justifiable and excusable homicide, and the cases there cited, are applicable here.[26] The reverse of this proposition, however, is not true. Very much less will excuse an assault and battery, not amounting to an assault with intent to kill or to inflict grievous bodily harm, than would be necessary to justify or excuse a homicide.

An accident happening in the performance of a lawful act done with due care will excuse an assault and battery

63 Ga. 578, 36 Am. Rep. 120. "If, when engaged in an unlawful and dangerous sport, a man kills another by accident, it is manslaughter. * * * Death produced by practical joking is manslaughter." 1 Whart. Cr. Law, § 1012. And where death does not result, but merely a bodily injury, however slight, it is an assault and battery. Injury to nonparticipating student in game of "rush" by other students held an assault and battery. Markley v. Whitman, 95 Mich. 236, 54 N. W. 763, 20 L. R. A. 55, 35 Am. St. Rep. 558.

[25] Com. v. Randall, 4 Gray (Mass.) 36; Com. v. Seed, 5 Clark. (Pa.) 78; FLOYD v. STATE, 36 Ga. 91, 91 Am. Dec. 760, Mikell Illus. Cas. Criminal Law, 143.

[26] Ante, pp. 173, 192, et seq. In Farmer v. State, 7 Ga. App. 688, 67 S. E. 834, it was held that words used to a brother assailing his sister's character for chastity, modesty, and virtue might be a provocation for assault and battery by the brother, and that it was for the jury to say whether they constituted such provocation, and whether the assault and battery exceeded the provocation.

resulting therefrom;[27] but if the accident happen in doing an act malum in se, as said above, it may be otherwise.[28]

An officer or private person legally arresting or restraining a person does not commit an assault and battery, as the law justifies him;[29] but it is otherwise if the arrest or restraint is illegal, either because there is no right to arrest or restrain at all, or because unnecessary force or unauthorized restraint is used.[30]

A parent, guardian, teacher, or master chastising his child, ward, pupil, or apprentice does not commit a criminal assault and battery if the punishment is moderate;[31] but it is

[27] 1 Russ. Crimes, 1025.

[28] COM. v. ADAMS, 114 Mass. 323, 19 Am. Rep. 362, Mikell Illus. Cas. Criminal Law, 30.

[29] State v. Hull, 34 Conn. 132; State v. Gregory, 30 Mo. App. 582; Baker v. Barton, 1 Colo. App. 183, 28 Pac. 88; U. S. v. Fullhart (C. C.) 47 Fed. 802; State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44.

[30] State v. Parker, 75 N. C. 249, 22 Am. Rep. 669; State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; Burns v. State, 80 Ga. 544, 7 S. E. 88; State v. Roseman, 108 N. C. 765, 12 S. E. 1039; Stone v. State, 56 Ark. 345, 19 S. W. 968; Delafoile v. State, 54 N. J. Law, 381, 24 Atl. 557, 16 L. R. A. 500. Use of handcuffs, when authorized, State v. Sigman, 106 N. C. 728, 11 S. E. 520. To shoot at one who is escaping after arrest for misdemeanor is an assault. Id. See, ante, p. 175 et seq.; and see Ben. & H. Lead. Cas. 177, and note.

[31] Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; State v. Harris, 63 N. C. 1; married minor child, Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682; teacher and pupil, Com. v. Randall, 4 Gray (Mass.) 36; Metcalf v. State, 21 Tex. App. 174, 17 S. W. 142; Heritage v. Dodge, 64 N. H. 297, 9 Atl. 722; Bolding v. State, 23 Tex. App. 172, 4 S. W. 579; Hutton v. State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776. An elder brother, caring for and supporting a 15 year old sister, may moderately restrain and correct her. Snowden v. State, 12 Tex. App. 105, 41 Am. Rep. 667. So a stepfather may correct a stepchild. State v. Alford, 68 N. C. 322. To render chastisement by one standing in loco parentis

otherwise if the punishment is immoderate,[32] or, in case of teacher and pupil, if it is for breach of an unreasonable rule.[33] A person in charge of a railroad train, station, or other public place may eject a passenger or other person for conduct which disturbs the peace or safety of other passengers or persons there present, or for violation of reasonable rules.[34] But if he acts without sufficient ground, or uses unreasonable force, he will be guilty of assault and battery.[35] A husband could at one time punish his wife, but it is generally held that he no longer has such a right.[36] There are cases, however, which recognize the right as still existing.[37] A master could formerly punish his servant, but

criminal, the chastisement must be done malo animo, or must be so severe as to inflict some permanent injury. Holmes v. State (Ala.) 39 South. 569.

[32] Fletcher v. People, 52 Ill. 395; Hinkle v. State, 127 Ind. 490, 26 N. E. 777; Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; Neal v. State, 54 Ga. 281. In Alabama it is held that excessive punishment does not render a parent liable, unless there is also legal malice or some permanent injury. Dean v. State, 89 Ala. 46, 8 South. 38; BOYD v. STATE, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31, Mikell Illus. Cas. Criminal Law, 144. Excessive punishment by teacher. Patterson v. Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; BOYD v. STATE, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31, Mikell Illus. Cas. Criminal Law, 144.

[33] State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266, 9 Am. St. Rep. 820.

[34] State v. Goold, 53 Me. 279; Com. v. Dougherty, 107 Mass. 243 (sexton in church); People v. Caryl, 3 Parker, Cr. R. (N. Y.) 326; Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. 590.

[35] People v. McKay, 46 Mich. 439, 9 N. W. 486, 41 Am. Rep. 169; New Jersey Steam-Boat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049. Ejecting person wrongfully on train before it has stopped is a criminal assault. State v. Kinney, 34 Minn. 311, 25 N. W. 705.

[36] Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383; State v. Oliver, 70 N. C. 60; Reg. v. Jackson, [1891] 1 Q. B. Div. 671.

[37] Com. v. Wood, 97 Mass. 225.

he cannot do so now without being guilty of an assault.[38] There are exceptions to this statement in case of apprentices,[39] and also in case of seamen while at sea.[40]

If a person is assaulted without felonious intent, he may defend himself, and use all necessary force for the purpose of repelling his assailant, provided he does not go to the extreme of taking his assailant's life or inflicting grievous bodily harm. He can only go to this extreme when necessary to save his life or prevent grievous bodily harm, and he cannot in any case use more force than is necessary, without himself becoming liable for assault and battery.[41] An unlawful attempt to arrest or a false imprisonment is an assault which may be resisted by necessary force, short of taking life or inflicting grievous bodily harm.[42] One may also defend a person with whom he stands in a family relation, without being guilty of an assault, whenever, under the circumstances, he would have the right to defend himself, but not otherwise.[43] A person is not bound to retreat to avoid an assault, but may stand his ground and return blow for blow, and he need not wait for the intended blow to fall before striking to prevent it;[44] but, as we have seen, if, in the course of the difficulty, his assailant manifests a

[38] Matthews v. Terry, 10 Conn. 455; Com. v. Baird, 1 Ashm. (Pa.) 267.

[39] State v. Dickerson, 98 N. C. 708, 3 S. E. 687; Davis v. State, 6 Tex. App. 133.

[40] Thompson v. The Stacey Clarke (D. C.) 54 Fed. 533; Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793; U. S. v. Beyer (C. C.) 31 Fed. 35.

[41] FLOYD v. STATE, 36 Ga. 91, 91 Am. Dec. 760, Mikell Illus. Cas. Criminal Law, 143.

[42] Massie v. State, 27 Tex. App. 617, 11 S. W. 638.

[43] Jones v. Fortune, 128 Ill. 518, 21 N. E. 523; Drinkhorn v. Bubel, 85 Mich. 532, 48 N. W. 710.

[44] Gallagher v. State, 3 Minn. 270 (Gil. 185).

purpose to take his life or to inflict grievous bodily harm, he must retreat, if he can safely do so, before going to the extreme of killing his assailant to save himself.[45] The principle that one who brings on a difficulty cannot defend himself, which has been discussed in treating of homicide in self-defense, applies likewise to assaults in self-defense.[46]

A person, while he cannot kill another, or use a deadly weapon, to prevent a trespass on his property [47] not amounting to an attempt to commit a felony by force or surprise,[48] may use any necessary force short of this in resisting a forcible trespass. If a person seeks to take or injure another's property, not by robbery, or to trespass on his premises otherwise than by forcibly attempting to enter his habitation, the latter may use all necessary force, short of force endangering life, to prevent the trespass or to eject the trespasser.[49] It is said that one cannot use force to recapture his property, nor attack a trespasser who has retreated, but

[45] Ante, p. 199.

[46] People v. Miller, 49 Mich. 23, 12 N. W. 895. See ante, p. 200.

[47] State v. Gilman, 69 Me. 163, 31 Am. Rep. 257; STATE v. MORGAN, 25 N. C. 186, 38 Am. Dec. 714, Mikell Illus. Cas. Criminal Law, 107; People v. Horton, 4 Mich. 67.

[48] Ante, p. 179.

[49] Com. v. Kennard, 8 Pick. (Mass.) 133 (resisting attempt to take chattel); Com. v. Clark, 2 Metc. (Mass.) 23 (ejecting trespasser); People v. Payne, 8 Cal. 341; People v. Batchelder, 27 Cal. 69, 85 Am. Dec. 231; People v. Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143; Com. v. Ribert, 144 Pa. 413, 22 Atl. 1031; Circle v. State (Tex. Cr. App.) 22 S. W. 608; State v. Taylor, 82 N. C. 554; State v. Austin, 123 N. C. 749, 31 S. E. 731. May not use deadly weapon. Montgomery v. Com., 98 Va. 840, 36 S. E. 371. Defense of one's dog justifiable. State v. McDuffie, 34 N. H. 523, 69 Am. Dec. 516. A saloon being a house of public entertainment, the proprietor cannot eject one who is guilty of no misconduct, and is engaged in the business usually transacted there. Connors v. State, 117 Ind. 347, 20 N. E. 478. Otherwise in case of misconduct. Burrell v. State, 129 Ind. 290, 28 N.

must resort to the law for redress;[50] but, if the owner's possession of property is only momentarily interrupted, he may use force to regain it.[51] In no case can more force be used than is necessary.[52] A person may eject a trespasser from his house; but if he use more force than is necessary, as if he kicks him, he commits an assault and battery.[53] Mere abusive words or malignant and taunting gestures are never a justification, even for a common assault.[54]

E. 699. In Texas it was held that the law recognizes no rules for the protection of a gambling room or games played in violation of law, and therefore a gambler cannot justify an assault on the ground that it was committed in ejecting the person assaulted from the gambling room for disorder. Pierce v. State, 21 Tex. App. 540, 1 S. W. 463.

[50] State v. Conally, 3 Or. 69; Hendrix v. State, 50 Ala. 148; Kirby v. Foster, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317. Cannot assault officer and retake animals impounded under an invalid ordinance. State v. Black, 109 N. C. 856, 13 S. E. 877, 14 L. R. A. 205.

[51] Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591; Com. v. Lynn, 123 Mass. 218; State v. Elliot, 11 N. H. 540, 545. The right of recapture is not lost, though the property is temporarily out of sight, if pursuit is immediate. State v. Dooley, 121 Mo. 591, 26 S. W. 558.

[52] State v. Tripp, 34 Minn. 25, 24 N. W. 290; State v. Burke, 82 N. C. 551. Unnecessary force in resisting unlawful arrest. People v. Murray, 54 Hun, 406, 7 N. Y. Supp. 548. In Michigan it is held that a person violently and causelessly assaulted by another is not limited to the use of force so long only as the necessity for self-defense exists, but may chastise the aggressor within the natural limits of the provocation received. People v. Pearl, 76 Mich. 207, 42 N. W. 1109, 4 L. R. A. 709, 15 Am. St. Rep. 304.

[53] Wild's Case, 2 Lewin, Cr. Cas. 214.

[54] State v. Workman, 39 S. C. 151, 17 S. E. 694; Scott v. Fleming, 16 Ill. App. 540; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; Donnelly v. Harris, 41 Ill. 126; Cross v. State, 63 Ala. 40; Rauck v. State, 110 Ind. 384, 11 N. E. 450; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Tatnall v. Courtney, 6 Houst. (Del.) 434; State v. Briggs (Tex. Cr. App.) 21 S. W. 46. Threats without hostile demonstration no defense. Martin v. State, 5 Ind. App. 453,

Same—Consent of Person Assaulted

Consent of the person assaulted and beaten is a defense,[55] provided the act consented to does not amount or tend to a breach of the public peace, and is not with intent to commit such a crime that, in case the crime were accomplished, consent would be no excuse; and provided the person is old enough and of sufficient mental capacity to be deemed in law capable of consenting; and provided, further, that the consent is not obtained by fraud or intimidation.

The law recognizes as not necessarily unlawful manly sports calculated to give bodily skill, strength, and activity, such as playing at cudgels or foils or wrestling or sparring by consent, there being no motive or intention to do bodily harm on either side. But prize fights and encounters which are, or even tend to breaches of the peace, are unlawful, even when entered into by consent.[56]

If persons voluntarily engage in mutual combat in a public place, as in case of prize fighting, so as to commit a breach of the public peace, either may be prosecuted for an assault on the other, notwithstanding their mutual consent.[57] A wrestling match is a lawful sport, but if persons engage in a wrestling match for the purpose of doing each other injury, each endeavoring to do and doing all the injury in his power to the other, each may be convicted of as-

32 N. E. 594. This rule has been changed by statute in some states. See Spigner v. State, 103 Ala. 30, 15 South. 892; Wood v. State, 64 Miss. 761, 2 South. 247; Murphy v. State, 92 Ga. 75, 17 S. E. 845; Hodgkins v. State, 89 Ga. 761, 15 S. E. 695.

[55] STATE v. BECK, 1 Hill (S. C.) 363, 26 Am. Dec. 190, Mikell Illus. Cas. Criminal Law, 147; Champer v. State, 14 Ohio St. 437; People v. Bransby, 32 N. Y. 525.

[56] Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328.

[57] Fost. Crown Law, 260; 1 East, P. C. 270; Rex. v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; REG. v. CONEY, 8 Q. B. D. 534, Mikell Illus. Cas. Criminal Law, 5.

sault and battery.[58] A person cannot consent to be killed or maimed,[59] or to suffer the infliction of a dangerous act which may result in severe bodily injury.[60] If the act is not of a nature to inflict severe injury, consent is a defense; at least if the act, under the circumstances, does not tend to a breach of the peace.[61]

Where the assault is with intent to commit a specific crime, and consent to the crime would be a defense on a prosecution therefor, consent will be a defense on a prosecution for the assault. Thus, robbery is not committed if a person consents to his property being taken, and therefore his consent would prevent an assault with intent to take his property from being an assault with intent to rob. Rape cannot be committed if the woman consents, provided she is capable of consenting; and therefore her consent will be a defense on a prosecution for assault with intent to rape. The consent, however, must be prior to the assault. If an assault with intent to rape is made, the fact that the woman afterwards consents to the intercourse will not prevent a prosecution for the assault.[62]

In all cases the person consenting must be capable of consenting. A very young child cannot consent to an assault, nor can an insane person;[63] and, where the statute against

[58] Com. v. Collberg, supra.

[59] 1 Inst. 107a, 107b; WRIGHT'S CASE, Co. Litt. 127a, Mikell Illus. Cas. Criminal Law, 5; Reg. v. Barronet, Dears. Cr. Cas. 51; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

[60] Reg. v. Bradshaw, 14 Cox, Cr. Cas. 83.

[61] STATE v. BECK, 1 Hill (S. C.) 363, 26 Am. Dec. 190, Mikell Illus. Cas. Criminal Law, 147.

[62] State v. Hartigan, 32 Vt. 607, 78 Am. Dec. 609; State v. Bagan, 41 Minn. 285, 43 N. W. 5; Dickey v. McDonnell, 41 Ill. 62; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519.

[63] Reg. v. Fletcher, 8 Cox, Cr. Cas. 131.

carnal knowledge of girls under a specified age expressly or impliedly makes their consent unnecessary, they cannot consent to an assault with intent to have carnal knowledge of them.[64] If consent is obtained by fraud, so that the act done, owing to the fraud, is a different act from that consented to, it is no defense to the assault. Thus, where a medical practitioner had connection with a young girl, who submitted from a bona fide belief that he was, as he represented, treating her professionally, he was guilty of an assault.[65] So, where a person administers a deleterious drug mixed with food to one who takes it in ignorance that it contains the drug, he is guilty of assault and battery.[66] Nor is consent induced by intimidation a defense.[67]

[64] State v. Rollins, 8 N. H. 550; State v. Farrar, 41 N. H. 53; COM. v. NICKERSON, 5 Allen (Mass.) 518, Mikell Illus. Cas. Criminal Law, 148; Givens v. Com., 29 Grat. (Va.) 830; Hadden v. People, 25 N. Y. 373; State v. Grossheim, 79 Iowa, 75, 44 N. W. 541; Comer v. State (Tex. Cr. App.) 20 S. W. 547; Proper v. State, 85 Wis. 615, 55 N. W. 1035; In re Lloyd, 51 Kan. 501, 33 Pac. 307; Hays v. People, 1 Hill (N. Y.) 352; People v. McDonald, 9 Mich. 150; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Murphy v. State, 120 Ind. 115, 22 N. E. 106, overruling Stephens v. State, 107 Ind. 185, 8 N. E. 94; People v. Goulette, 82 Mich. 36, 45 N. W. 1124; Davis v. State, 31 Neb. 247, 47 N. W. 854; State v. Wray, 109 Mo. 594, 19 S. W. 86. Contra, State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; Whitcher v. State, 2 Wash. 286, 26 Pac. 268; Reg. v. Woodhurst, 12 Cox, C. C. 443; Reg. v. Read, 2 Car. & K. 957.

[65] Reg. v. Case, 4 Cox, Cr. Cas. 220. See, also, Rex v. Rosinski, 1 Moody, Cr. Cas. 19. Ante, p. 249.

[66] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350. Where a girl had intercourse with a man, who, unknown to her, had a venereal disease, which he communicated to her, though not guilty of rape because of consent, he was guilty of an assault. Reg. v. Bennett, 4 Fost. & F. 1105. See, also, Reg. v. Sinclair, 13 Cox, Cr. Cas. 28. Where, under similar circumstances, a man had intercourse with

[67] See note 67 on following page.

FALSE IMPRISONMENT

84. False imprisonment is any unlawful restraint of a person's liberty, and is a misdemeanor at common law.

False imprisonment is an offense against the liberty of a person, and is indictable as a specific crime at common law.[68] The crime necessarily includes an assault, however, and for this reason the prosecution is usually for assault, so that there are not many prosecutions for false imprisonment eo nomine. False imprisonment is also declared a crime by statute in many of the states, but some, if not all, of them, are merely declaratory of the common law.[69] The crime is committed whenever a person detains the body of another by force, actual or constructive, without his consent, and without legal cause. Two things are necessary: (1) There must be an imprisonment; and (2) the imprisonment must be unlawful. Every confinement of a person is an imprisonment, whether it be in a jail, or in a private house, or merely by detaining him for a moment in the street.[70] No actual force need be used. There is an imprisonment if one is coerced to submit to detention by threats. Any restraint of liberty is a detention, and therefore an imprisonment; as, for instance, where a man by threats and fear prevented another from going in a certain direction on a public road, and

his wife, the majority of the court held it not an assault. Reg. v. Clarence, 16 Cox, Cr. Cas. 511.

[67] Reg. v. Woodhurst, 12 Cox, Cr. Cas. 443.

[68] 2 Inst. 589; 3 Bl. Comm. 127; 4 Bl. Comm. 218; 2 Bish. Cr. Law, § 749; People v. Ebner, 23 Cal. 158; Smith v. State, 63 Wis. 453, 23 N. W. 879; Davies v. State, 72 Wis. 54, 38 N. W. 722.

[69] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; People v. Wheeler, 73 Cal. 252, 14 Pac. 796.

[70] 1 Russ. Crimes, 1024; 3 Bl. Comm. 127; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250.

compelled him either to stop, or to turn back, or even to take another direction.[71] The imprisonment, however, to be criminal, must be false; that is, it must be without legal cause or excuse. There must be an unlawful detention, and such detention will be unlawful unless there be some sufficient authority for it, arising either from some process from the courts of justice, or from some legal warrant of a legal officer having power to commit, or arising from special cause, sanctioned for the necessity of the thing either by the common law or by statute.[72] An officer who arrests a person without authority, or a judicial officer who unlawfully orders his imprisonment, or a jailer who, without authority, confines him, is guilty of this crime;[73] and a person who procures the arrest of another without any legal cause or authority is guilty, though not present when the arrest is made.[74] Even a father may be guilty of false imprisonment of his child, as, for instance, by cruelly confining him in a dark, damp, and dirty cellar, as this is unlawful correction.[75]

[71] Harkins v. State, 6 Tex. App. 452; Bloomer v. State, 3 Sneed (Tenn.) 66; SMITH v. STATE, 7 Humph. (Tenn.) 43, Mikell Illus. Cas. Criminal Law, 148; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786. Where a person is decoyed from home as a joke, and he goes willingly, there is no false imprisonment. State v. Lunsford, 81 N. C. 528. To stop a carriage in which a person is riding may be a false imprisonment. State v. Edge, 1 Strob. (S. C.) 91.

[72] 1 Russ. Crimes, 1024.

[73] Francisco v. State, 24 N. J. Law, 30; Vanderpool v. State, 34 Ark. 174; State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529. Person aiding an officer, at the latter's command, to make an arrest without authority, is liable, as he can have no greater rights than the officer. Mitchell v. State, 12 Ark. 50, 54 Am. Dec. 253.

[74] Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250.

[75] Fletcher v. People, 52 Ill. 395.

KIDNAPPING

85. Kidnapping with us is a false imprisonment aggravated by conveying, and, in some states, by a mere intent to convey, the person imprisoned to another place. It is a misdemeanor at common law.[76]

Under the old common law, kidnapping was "the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another;"[77] but with us sending the person into a foreign country is not necessary.[78] Statutes on the subject have been passed in many of the states, some of which are declaratory of the common law. Under the Illinois statute it has been held that physical force and violence in the taking and carrying away is not necessary, but that threats and menaces coercing the will are sufficient.[79] Imprisonment of a person with intent to convey him out of the state, or away from his

[76] 2 Bish. New Cr. Law, §§ 750, 755; 1 East, P. C. 430; Rosc. Ev. 465.

[77] 4 Bl. Comm. 219; State v. Whaley, 2 Har. (Del.) 538; Click v. State, 3 Tex. 282.

[78] State v. Rollins, 8 N. H. 550. And see People v. Ebner, 23 Cal. 158; Smith v. State, 63 Wis. 453, 23 N. W. 879. Taking into another county. Ex parte Keil, 85 Cal. 309, 24 Pac. 742; People v. Fick, 89 Cal. 144, 26 Pac. 759.

[79] Moody v. People, 20 Ill. 315. And see Smith v. State, 63 Wis. 463, 23 N. W. 879; Hadden v. People, 25 N. Y. 373; People v. Merrill, 2 Parker, Cr. R. (N. Y.) 590; COM. v. NICKERSON, 5 Allen (Mass.) 518, Mikell Illus. Cas. Criminal Law, 148; State v. Farrar, 41 N. H. 53; Davenport v. Com., 1 Leigh (Va.) 588; Thomas v. Com., 2 Leigh (Va.) 741. Inveigling female to take passage for foreign port, under false pretenses, People v. De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444; Id., 47 Hun (N. Y.) 308. What constitutes inveiglement, People v. Fitzpatrick, 57 Hun, 459, 10 N. Y. Supp. 629. To inveigle another by false representations, with intent that he

residence is kidnapping in some states.[80] The crime is not committed if the person taken consents, provided he or she is old enough, and of sufficient mental capacity, to be deemed in law capable of consenting, and the consent is not obtained by fraud.[81] Under the New York statute a father who procures an adjudication that his daughter is insane, and publicly conveys her, without force, to an asylum, is not guilty of kidnapping, though the girl is in fact sane;[82] nor is a father guilty if he in good faith, after consulting physcians, causes his sane child to be confined as insane.[83] It has also been held that it is not kidnapping at common law for a father to seize and carry away his child who has been

shall be induced to leave the state of his apparent free will, is causing him to be sent out of the state against his will, under the Oregon statute. In re Kelly (C. C.) 46 Fed. 653.

[80] Click v. State, 3 Tex. 282; Com. v. Blodgett, 12 Metc. (Mass.) 56; State v. McRoberts, 4 Blackf. (Ind.) 178; Moody v. People, 20 Ill. 315; John v. State, 6 Wyo. 203, 44 Pac. 51. The intent must be alleged and proved. State v. Sutton, 116 Ind. 527, 19 N. E. 602. And see other cases cited. Negativing exceptions of statute, State v. Kimmerling, 124 Ind. 382, 24 N. E. 722; Pruitt v. State, 102 Ga. 688, 29 S. E. 437. Under the Indiana statute force or fraud are essential. Eberling v. State, 136 Ind. 117, 35 N. E. 1023. Any place where the child has a right to be is its "residence." Wallace v. State, 147 Ind. 621, 47 N. E. 13.

[81] State v. Farrar, 41 N. H. 53; Com. v. Robinson, Thatcher, Cr. Cas. (Mass.) 488; State v. Rollins, 8 N. H. 550; COM. v. NICKERSON, 5 Allen (Mass.) 518, 527, Mikell Illus. Cas. Criminal Law, 148; People v. De Leon, 47 Hun (N. Y.) 308; Castillo v. State, 29 Tex. App. 127, 14 S. W. 1011; Higgins v. Com., 94 Ky. 54, 21 S. W. 231. A person may be too drunk to give consent. Hadden v. People, 25 N. Y. 373.

[82] Under Pen. Code, § 211, providing that one who willfully seizes, confines, inveigles, or kidnaps another, with intent to cause him without authority of law to be secretly confined or imprisoned within the state, is guilty of kidnapping. People v. Camp, 139 N. Y. 87, 34 N. E. 755. See In re Marceau, 32 Misc. Rep. 217, 65 N. Y. Supp. 717.

[83] People v. Camp, 66 Hun, 531, 21 N. Y. Supp. 741.

placed in the custody of the mother by decree of court,[84] but the weight of authority and reason is against this view.[85]

It is none the less kidnapping, though the seizing was done under a lawful warrant, if the intent of the officer in making the arrest and transporting the person arrested was to take the person to a place other than the destination named in the warrant.[86]

ABDUCTION

86. Abduction may be generally defined as the taking of a female without her consent, or without the consent of her parents or guardian, for the purpose of marriage or prostitution.

87. It is probably not a crime at common law, unless as kidnapping, but is made so by statute in most of the states.

The statutes in the different states defining the crime of abduction differ materially, and some of the statutory provisions are not included in the general definition given above. It will be well, therefore, for the student to consult his statute at this point. The statutes of most of the states are modeled after an old English statute which defined the crime substantially as the taking of a woman against her

[84] Burns v. Com., 129 Pa. 138, 18 Atl. 756. A father, who, by contract, surrendered to his wife all his rights to the custody of their child, but later enticed the child away, cannot be convicted of kidnapping, the agreement with the mother not relieving him of the duty of maintaining the child. State v. Powe (Miss.) 66 South. 207.

[85] State v. Farrar, 41 N. H. 53; COM. v. NICKERSON, 5 Allen (Mass.) 519, Mikell Illus. Cas. Criminal Law, 148; In re Peck, 66 Kan. 693, 72 Pac. 265.

[86] People v. Fick, 89 Cal. 144, 26 Pac. 759.

will for lucre, and afterwards marrying her, or causing her to be married to another, or defiling her, or causing her to be defiled.[87] It seems never to have been decided whether this statute is a part of our common law, though it is old enough, if it is applicable to our conditions.[88] Among the statutory definitions the following may be stated, as they are very general, namely: For a person to take[89] or detain[90] a female unlawfully, against her will,[91] with intent to compel her to marry him or any other person,[92] or to be defiled; to take[93] or entice[94] a female under a specified age, in some states as high as eighteen years, for the purpose of prostitution,[95] or sexual intercourse,[96] or, in some states, for

[87] 3 Hen. VII. c. 2; 4 Bl. Comm. 208.

[88] Ante, p. 21.

[89] Inducing female by solicitations and presents to leave home is a taking. State v. Johnson, 115 Mo. 480, 22 S. W. 463.

[90] For a man to go to the room of a sleeping girl, remove the bed clothes, and expose his person and hers, without awakening her, has been held a taking and a detention. Malone v. Com., 91 Ky. 307, 15 S. W. 856. And see Payner v. Com. (Ky.) 19 S. W. 927; Couch v. Com. (Ky.) 20 S. W. 29. Detention necessary. Krambiel v. Com. (Ky.) 2 S. W. 555.

[91] Detention of an insane woman is "against her will." Higgins v. Com., 94 Ky. 54, 21 S. W. 231. So of a woman asleep. Malone v. Com., 91 Ky. 307, 15 S. W. 856.

[92] State v. Maloney, 105 Mo. 10, 16 S. W. 519.

[93] Force not necessary. People v. Demousset, 71 Cal. 611, 12 Pac. 788.

[94] No direct proposition to go away is necessary. People v. Carrier, 46 Mich. 442, 9 N. W. 487.

[95] People v. Cummons, 56 Mich. 544, 23 N. W. 215; Brown v. State, 72 Md. 468, 20 Atl. 186. To take a female for intercourse with one's self not within the statute. State v. Brow, 64 N. H. 577, 15 Atl. 216. See, also, State v. Rorebeck, 158 Mo. 130, 59 S. W. 67. To take girl to unoccupied house, that a third person may for that one occasion have intercourse with her, is not within the statute. Haygood v. State, 98 Ala. 61, 13 South. 325.

[96] Com. v. Cook, 12 Metc. (Mass.) 93; State v. Stone, 106 Mo. 1,

the purpose of concubinage;[97] or, without her parent's or guardian's[98] consent, for the purpose of marriage,[99] and, in some states, to take an infant child from its parent or guardian for any purpose;[1] to inveigle[2] or entice[3] an unmarried

16 S. W. 890; State v. Ruhl, 8 Iowa, 447; State v. Stoyell, 54 Me. 24, 89 Am. Dec. 716; People v. Parshall, 6 Parker, Cr. R. (N. Y.) 129. Purpose must be proved. State v. Jamison, 38 Minn. 21, 35 N. W. 712. The gist of the offense is the taking away against the will of the parent or guardian, and unchastity of the girl is no defense. People v. Demousset, 71 Cal. 611, 12 Pac. 788. See, to same effect, State v. Gibson, 111 Mo. 92, 19 S. W. 980; State v. Johnson, 115 Mo. 480, 22 S. W. 463; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149. Cf. South v. State, 97 Tenn. 496, 37 S. W. 210.

[97] State v. Overstreet, 43 Kan. 299, 23 Pac. 572. What is a taking for purpose of "concubinage." State v. Gibson, 108 Mo. 575, 18 S. W. 1109; State v. Bussey, 58 Kan. 679, 50 Pac. 891. If a woman is taken for the purpose of concubinage, actual sexual intercourse is not necessary. State v. Richardson, 117 Mo. 586, 23 S. W. 769. No length of time nor long continuance of intercourse is necessary. Henderson v. People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391. Taking for intercourse on single occasion not sufficient. State v. Wilkinson, 121 Mo. 485, 26 S. W. 366. Cf. State v. Bobbst, 131 Mo. 328, 32 S. W. 1149. Consent of female no defense. State v. Bobbst, supra.

[98] A guardian is any one who has rightful care of the girl. People v. Carrier, 46 Mich. 442, 9 N. W. 487.

[99] Where the girl is below the specified age, but above the age at which she can marry without her parents' consent, a man who takes her from her parents, and validly marries her, is not guilty. Cochran v. State, 91 Ga. 763, 18 S. E. 16.

[1] In Kansas, both parents being equally the natural guardians of the persons of their children, a man who assists a wife in deserting her husband, and in taking with her her minor child, is not guilty. State v. Angel, 42 Kan. 216, 21 Pac. 1075. Pennsylvania statute does not apply to father taking legitimate child from mother. Burns v. Com., 129 Pa. 138, 18 Atl. 756. Taking by persuasion is within a statute punishing one who shall "abduct or by any means induce" a child to leave its parents. State v. Chisenhall, 106 N. C. 676, 11 S. E. 518.

[2] See ante, p. 280, note 79.

[3] See ante, p. 283, note 94.

female under a certain age, of previous chaste character,[4] into a house of ill fame or of assignation, or elsewhere,[5] for the purpose of prostitution or sexual intercourse; or for a parent or guardian, or other person having legal charge of the person of a female under a certain age, to consent to her being taken or detained for the purpose of prostitution. Some of the statutes require forcible abduction. In such case the force is supplied by fraud, threats, or undue influence.[6] Whether or not consent of the female deprives the taking of its criminal character depends on the circumstances.[7] A very young child would be deemed incapable of consenting, and her consent would be no excuse;[8] so, also, where an insane woman is detained for the purpose of carnal knowledge.[9] The statutes prohibiting abduction of girls un-

[4] Actual chastity must be proved. Kauffman v. People, 11 Hun, 82; People v. Parshall, 6 Parker, Cr. R. (N. Y.) 129; Carpenter v. People, 8 Barb. (N. Y.) 603; State v. Carron, 18 Iowa, 372, 87 Am. Dec. 401. Single prior act of illicit intercourse renders woman of "unchaste character." Lyons v. State, 52 Ind. 426. The fact of unchastity with accused, but not with other men, is no defense. People v. Millspaugh, 11 Mich. 278. Female who has been unchaste, but has reformed, is within the statute. Scruggs v. State, 90 Tenn. 81, 15 S. W. 1074. Chastity presumed. Bradshaw v. People, 153 Ill. 156, 38 N. E. 652. See, also, post, p. 423, and notes.

[5] Place must be of character named, or like place. State v. McCrum, 38 Minn. 154, 36 N. W. 102. A statute making it an offense to detain any female, by force or intimidation in any room, against her will, for prostitution, or with intent to cause her to become a prostitute and be guilty of fornication, held not to apply to a man who had intercourse with his stepdaughter against her will in his own house. Bunfill v. People, 154 Ill. 640, 39 N. E. 565.

[6] People v. Parshall, 6 Parker, Cr. R. (N. Y.) 129; Moody v. People, 20 Ill. 315. And see State v. Keith, 47 Minn. 559, 50 N. W. 691.

[7] Mason v. State, 29 Tex. App. 24, 14 S. W. 71; Lampton v. State (Miss.) 11 South. 656.

[8] State v. Farrar, 41 N. H. 53. See, also, ante, pp. 12, 246.

[9] Higgins v. Com., 94 Ky. 54, 21 S. W. 231. See, also, ante, pp. 12, 246.

der a specified age do not require want of consent on the girl's part, and consent is no defense.[10] We have already seen that, where a girl under the age specified in the statute is abducted, it is no excuse for the accused to say that he did not know her age, or believed that she was older.[11]

[10] Scruggs v. State, 90 Tenn. 81, 15 S. W. 1074; State v. Stone, 106 Mo. 1, 16 S. W. 890; State v. Keith, 47 Minn. 559, 50 N. W. 691.

[11] Ante, p. 95, note 98. But see, under Texas statute, Mason v. State, 29 Tex. App. 24, 14 S. W. 71.

CHAPTER X

OFFENSES AGAINST THE HABITATION

88–90. Arson.
91–93. Burglary.

ARSON

88. **Arson at common law is the willful and malicious burning of the dwelling house of another.**[1]

89. **To constitute the crime**

(a) **There must be some burning, though it may be slight.**

(b) **It must be of a dwelling house, or outhouse used in connection therewith.**

(c) **The house must belong to another, at least as occupant.**

(d) **The burning must be caused maliciously.**

90. **Arson is a felony at common law.**[2]

The Burning

In order to constitute this crime there must be some burning. "Incendit et combussit," he hath burned and consumed, were the necessary words of the indictment to describe this element of the offense. To be a burning there must be some consuming of the material of which the house is built. If the wood of the house is only scorched and blackened, there is no burning within the definition.[3] But

[1] 3 Co. Inst. 66; 1 Hale, P. C. 566; 1 Hawk. P. C. c. 39; 4 Bl. Comm. 219; 2 East, P. C. c. 21, § 1.

[2] 2 Russ. Crimes, 1024.

[3] Reg. v. Parker, 9 Car. & P. 45; Woolsey v. State, 30 Tex. Ap

if the fibre of the wood is destroyed, no matter how slightly, it is sufficient.[4] There need not be a blaze; mere charring will suffice,[5] and it is immaterial how soon the fire is extinguished, or whether it was put out, or went out of itself.[6]

The House[7]

Arson is a crime against the security of a person's habitation rather than against the property, and the house burned must therefore be a dwelling house, or an outhouse used in connection therewith.[8] The dwelling must be occupied, but it need not be at the time actually inhabited, provided it is usually inhabited, and the owner is only temporarily absent.[9] To burn a house just completed, and intended as a residence, but not yet used or occupied as such, or a building which has been vacated without any intention of re-

346, 17 S. W. 546; REG. v. RUSSELL, Car. & M. 541, Mikell Illus. Cas. Criminal Law, 151.

[4] Blanchette v. State (Tex. Cr. App.) 24 S. W. 507; State v. Hall, 93 N. C. 571; People v. Haggerty, 46 Cal. 354; State v. Sandy, 25 N. C. 574; Benbow v. State, 128 Ala. 1, 29 South. 553.

[5] See cases cited in preceding note.

[6] REG. v. RUSSELL, Car. & M. 541, Mikell Illus. Cas. Criminal Law, 151; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Rex v. Stallion, Russ. & M. 398; Reg. v. Parker, 9 Car. & P. 45; State v. Spiegel, 111 Iowa, 701, 83 N. W. 722; Benbow v. State, 128 Ala. 1, 29 South. 553.

[7] The rules as to the character and occupancy of the premises are very much the same in case of arson as in case of burglary, and much of what is said in treating of the latter crime, and most of the cases cited, are applicable here. See post, p. 300.

[8] 4 Bl. Comm. 221. Burning haystack not arson at common law. Creed v. People, 81 Ill. 565.

[9] Stupetski v. Transatlantic Fire Ins. Co., 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; State v. Warren, 33 Me. 30; Meeks v. State, 102 Ga. 572, 27 S. E. 679.

turning, is not arson at common law.[10] The outhouses need not be actually adjoining the dwelling house, nor under the same roof, but are within the definition if they are within the curtilage; that is, if they are parcel thereof, and used in connection therewith, as in case of a stable.[11] The building may be occupied in part for other purposes than a dwelling; as, for instance, in the case of a store with sleeping apartments in the rear.[12] Buildings such as stables and other outhouses need not be actually inclosed by a fence to bring them within the curtilage,[13] but they must not be so far separate that they cannot be said to be part and parcel of the dwelling house. If a highway separates a barn from the dwelling house, it is not within the curtilage.[14]

The house or some part thereof must be burned, and not merely personal property in the house. Window casings, frames, and doors are part of the house within the definition.[15]

Ownership

The definition requires that the house burned be the house of another. As has been said, however, this crime is

[10] State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; State v. Warren, 33 Me. 30; Hooker v. Com., 13 Grat. (Va.) 763; State v. Wolfenberger, 20 Ind. 242; People v. Handley, 93 Mich. 46, 52 N. W. 1032; Rex v. Martin, Russ. & R. 108; Henderson v. State, 105 Ala. 82, 16 South. 931.

[11] Com. v. Barney, 10 Cush. (Mass.) 480; People v. Aplin, 86 Mich. 393, 49 N. W. 148; Washington v. State, 82 Ala. 31, 2 South. 356; Pitcher v. People, 16 Mich. 142; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Reg. v. Jones, 1 Car. & K. 303.

[12] People v. Orcutt, 1 Parker, Cr. R. (N. Y.) 252. But see People v. Fairchild, 48 Mich. 31, 11 N. W. 773.

[13] People v. Taylor, 2 Mich. 251; Pond v. People, 8 Mich. 150.

[14] Curkendall v. People, 36 Mich. 309; Luke v. State, 49 Ala. 30, 20 Am. Rep. 269. And see State v. Sampson, 12 S. C. 567, 32 Am. Rep. 513.

[15] State v. Spiegel, 111 Iowa, 701, 83 N. W. 722.

an offense against the habitation not against property merely. It is punished rather because of the danger to the persons living in the house than because of the loss of property resulting from the burning. Therefore the "house of another" in the definition means rather "the house occupied by another" than the house owned by another. Therefore it is arson for the legal owner to burn his house which is in the rightful possession of another.[16] For the same reason a tenant does not commit arson at common law by burning the house owned by another which the tenant occupies.[17]

It is not arson at common law for a person to burn his own dwelling house occupied by him,[18] but this is now changed in most of the states by statute.[19] If, however, one sets fire to his own house, and the flames spread to the house of another, he may be guilty.[20] A wife cannot at common law be guilty of arson in burning the house of her husband, nor a husband in burning the house of his wife, which they jointly occupy as their residence;[21] but this has to a great extent been changed by the statutes in

[16] State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Sullivan v. State, 5 Stew. & P. (Ala.) 175.

[17] 2 East, P. C. 1029; Holmes' Case, Cro. Car. 376; State v. Hannett, 54 Vt. 83; McNeal v. Woods, 3 Blackf. (Ind.) 485; State v. Lyon, 12 Conn. 487.

[18] Bloss v. Tobey, 2 Pick. (Mass.) 320; State v. Lyon, 12 Conn. 487; State v. Hurd, 51 N. H. 176.

[19] Shepherd v. People, 19 N. Y. 537; State v. Hurd, 51 N. H. 176.

[20] Post, p. 291.

[21] Rex v. March, 1 Moody, Cr. Cas. 182; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302. This rule applies only to persons lawfully married. It is arson for a man to burn the house of a woman with whom he is living in adultery. Com. v. Brooks, 164 Mass. 397, 41 N. E. 660. It has also been held that even though the parties are lawfully married, if they are not jointly occupying the house, the one living elsewhere is guilty of arson in setting fire to the house. Kopcyznski v. State, 137 Wis. 358, 118 N. W. 863, 16 Ann. Cas. 865.

the different states defining arson, and probably by the married woman's act in some of the states.[22] Since it is not arson for a man to burn his own house, the crime is not committed by one who burns a house at the owner's request, for the purpose of defrauding an insurance company.[23]

Malice

The state of mind necessary to constitute the crime is described as "willful and malicious." Therefore mere carelessness or negligence is not enough.[24] But if a man sets fire to his own house,[25] or to a building which is not a dwelling house,[26] and the fire spreads to an adjoining dwelling house as a natural result, he is guilty of arson. It is generally held that the burning need not be with a specific intent,[27] like the breaking and entry in burglary,[28] but that the doctrine of constructive intent[29] is applicable; under

[22] Garrett v. State, 109 Ind. 527, 10 N. E. 570; Emig v. Daum, 1 Ind. App. 146, 27 N. E. 322. Contra, Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

[23] Heard v. State, 81 Ala. 55, 1 South. 640; State v. Haynes, 66 Me. 307, 22 Am. Rep. 569; Com. v. Makely, 131 Mass. 421; Roberts v. State, 7 Cold. (Tenn.) 359; State v. Sarvis, 45 S. C. 668, 24 S. E. 53, 32 L. R. A. 647, 55 Am. St. Rep. 806.

[24] 3 Co. Inst. 67. And see 1 Hale, P. C. 569; 2 East, P. C. 1019; 2 Bish. New Cr. Law (8th Ed.) § 15; Whart. Cr. Law (11th Ed.) § 1057.

[25] Isaac's Case, 2 East, P. C. 1031 (where an owner sets fire to defraud insurer); Probert's Case, Id. 1030.

[26] State v. Laughlin, 53 N. C. 354; Combs v. Com., 93 Ky. 313, 20 S. W. 221. Some of the authorities give as a reason for this that "a man is presumed to intend the natural and probable results of his act," therefore implying that an intent to burn the house actually burned is necessary, at least where the burning of the first house was not a felony, so as to bring the case within the doctrine of constructive intent.

[27] Ante, p. 54. [28] Post, p. 302. [29] Ante, p. 56.

this doctrine, if, while engaged in the commission of a distinct felony, one unintentionally sets fire to a dwelling house, he commits arson.[80] And it has frequently been declared that, if a man were to fire a gun with felonious intent, as to commit murder, and should thereby accidentally set fire to a dwelling house, the burning would be arson.[81] If the act intended were less than felony—as a misdemeanor, or a mere trespass—the doctrine of constructive intent would not apply.[82]

It has been held not to be arson willfully to set fire to a jail, merely for the purpose of escaping, escape being a misdemeanor only,[83] but the weight of authority is to the contrary, and the latter cases would seem right on principle. In such a case there surely is an intent to burn the jail, and it is immaterial that the motive is to escape, and not to consume the jail. The law looks for the criminal intent, and this intent is the voluntary doing of the wrongful act. There would be just as much reason in holding a person not guilty of arson who willfully burns another's dwelling

[80] 3 Co. Inst. 67; 2 East, P. C. 1019. But see Reg. v. Faulkner, 13 Cox, Cr. Cas. 550. In this case the accused was indicted under a statute making it a felony to "unlawfully and maliciously" set fire to a ship. It was proved that accused set fire to the ship accidentally while stealing rum (a felony) in the hold of the ship. It was held that he could not be convicted under the statute.

[81] 2 East, P. C. 1019.

[82] 1 Hale, P. C. 569; 1 Bish. New Cr. Law, § 334; 2 Bish. New Cr. Law, § 14.

[83] State v. Mitchell, 27 N. C. 350; Delany's Case, 41 Tex. 601; People v. Cotteral, 18 Johns. (N. Y.) 115; Jenkins v. State, 53 Ga. 33, 31 Am. Rep. 255. Contra, Luke v. State, 49 Ala. 30, 20 Am. Rep. 269, Smith v. State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773 (overruling Delany's Case, supra); Lockett v. State, 63 Ala. 5; Willis v. State, 32 Tex. Cr. R. 534, 25 S. W. 123. And see Jesse v. State, 28 Miss. 100; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; Stevens v. Com., 4 Leigh (Va.) 683.

house for the purpose of getting in to steal property not of sufficient value to constitute the larceny a felony. On the other hand, if the decision that burning a jail to escape is not arson is based on the ground that there is no malice in the burning, it cannot be sustained on principle. The intent is to burn the jail and the act is intentional. Nothing more is needed to constitute malice. One who burns a dwelling house may do so for the purpose of burning the occupant, and not merely to consume the house, yet he would certainly be guilty of arson.[84] And it has been held that one is guilty of the statutory crime of "maliciously" setting fire to a building, though he did it to obtain a reward.[85]

Statutory Changes in the Law

In most of the states there are statutes which very materially change the common law by declaring it arson to burn other buildings than a dwelling house, such as vacant houses, shops, warehouses, vessels, and railroad cars, or to burn lumber, hay, grain, and the like. In some states it is declared arson for a person to burn his own house to obtain the insurance thereon and defraud the underwriters. In a few of the states the crime is divided into degrees; the first degree being where the burning is in the nighttime, and when there is a human being in the building; the second degree, where the burning is done in the daytime, or where the burning is at night, but there is no human being in the building; and the third degree comprising the less serious burnings. The statutes differ very materially, and it would not be practicable to do more than to direct attention to them.

[84] Smith v. State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; Luke v. State, 49 Ala. 30, 20 Am. Rep. 269.

[85] REX v. REGAN, 4 Cox, Cr. Cas. 335. Mikell Illus. Cas. Criminal Law, 27.

BURGLARY

91. Burglary at common law is the breaking and entering of the dwelling house of another in the nighttime, with intent to commit a felony therein.[86]

92. To constitute the crime

(a) There must be an actual or constructive breaking, and

(b) An entry.

(c) The house broken and entered must be the dwelling house of another. An outhouse within the curtilage is regarded as part of the dwelling house.

(d) Both the breaking and entry must be in the nighttime.

(e) And both must be with the intent to commit a felony in the house.

93. Burglary is a felony at common law.[87]

The Breaking

Some breaking is essential to constitute the crime of burglary. Breaking consists in putting aside a part of the house which obstructs entrance and is closed, or in penetrating by an opening which is as much closed as the nature of the case admits. Entering through an open door or window is not burglary.[88] Pushing open a door or win-

[86] 1 Hale, P. C. 358, 559; Hawk. P. C. c. 38; East, P. C. 495; 4 Bl. Comm. 224.

[87] 2 Russ. Crimes, 1024.

[88] Rex v. Spriggs, 1 Moody & R. 357; Rex v. Lewis, 2 Car. & P. 628; Johnson's Case, 2 East, P. C. 488; State v. Boon, 35 N. C. 244, 57 Am. Dec. 555; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; Rolland v. Com., 85 Pa. 66, 27 Am. Rep. 626; Williams v. State (Tex. App.) 13 S. W. 609; Neiderluck v. State, 23 Tex. App. 88, 3 S. W. 573; McGrath v. State, 25 Neb. 780, 41 N. W. 780.

dow which is partially open but not sufficiently so to admit the person of the intruder, is not burglary according to the older cases;[39] but the more modern cases hold otherwise.[40] It is not burglary to enter through an opening in the wall or roof,[41] though it is otherwise if the entry is through the chimney, for that is as much closed as the nature of things will permit.[42] It is burglary, however, to enter through an open door or window, and afterwards break an inner door.[43] The slightest actual breaking of any part of the house is sufficient.

Removing a plank placed to cover an opening,[44] lifting a hook with which a door is fastened,[45] removing props from a door,[46] entering through a hole under the sill,[47] or under

[39] Rex v. Smith, 1 Moody, Cr. Cas. 178; Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556; Com. v. Steward, 7 Dane, Abr. 136; Rose v. Com. (Ky.) 40 S. W. 245.

[40] Opening further a door or window already partly open is a sufficient breaking to constitute this element of burglary. State v. Lapoint, 87 Vt. 115, 88 Atl. 523, 47 L. R. A. (N. S.) 717; Clairborne v. State, 113 Tenn. 261, 83 S. W. 352, 68 L. R. A. 859, 106 Am. St. Rep. 833; State v. Sorenson, 157 Iowa, 534, 138 N. W. 411; Goins v. State (Ohio) 107 N. E. 335.

[41] Rex v. Spriggs, 1 Moody & R. 357. Removing slats attached to the outside of a window, and abstracting tacks and putty from the sash, without removing the glass, is not a breaking. Minter v. State, 71 Ark. 178, 71 S. W. 944.

[42] 1 Hawk. P. C. c. 38, § 4; 4 Bl. Comm. 226; Rex v. Brice, Russ. & R. 450; Donohoo v. State, 36 Ala. 281; State v. Willis, 52 N. C. 190; Walker v. State, 52 Ala. 376; Olds v. State, 97 Ala. 81, 12 South. 409; State v. Boon, 35 N. C. 244, 57 Am. Dec. 555.

[43] Rex v. Johnson, 2 East, P. C. 488; State v. Scripture, 42 N. H. 485; Johnston v. Com., 85 Pa. 54, 27 Am. Rep. 622; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; Rolland v. Com., 85 Pa. 66, 27 Am. Rep. 626.

[44] Carter v. State, 68 Ala. 96.

[45] Ferguson v. State, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

[46] Rose v. Com. (Ky.) 40 S. W. 245.

[47] Knotts v. State (Tex. Cr. App.) 32 S. W. 532.

the wall of an unfloored building,[48] is a sufficient breaking. The mere raising of a closed window or trapdoor held in place by its weight only,[49] or the breaking of an iron grating or twine netting over an open window,[50] or the lifting of a latch or other fastening,[51] or the turning of a knob in opening a door, or pushing open a closed door,[52] is a sufficient breaking. So, also, it is a breaking to push open a closed transom,[53] or to knock out a pane of glass which is already cracked.[54] The breaking must be of some part of the house or outhouse. Breaking into a chest, box, or trunk in

[48] Pressley v. State, 111 Ala. 34, 20 South. 647.

[49] Rex v. Haines, Russ. & R. 450; State v. Fleming, 107 N. C. 905, 12 S. E. 131; State v. Boon, 35 N. C. 244, 57 Am. Dec. 555; Rex v. Russell, 1 Moody, Cr. Cas. 377; Rex v. Hyams, 7 Car. & P. 441; State v. Herbert, 63 Kan. 516, 66 Pac. 235. But see Rex v. Lawrence, 4 Car. & P. 231. The fact that the accused slightly raised the window in the daytime, so that the bolt would not fasten, did not devest subsequent breaking and entry in the night of its character as burglary. PEOPLE v. DUPREE, 98 Mich. 26, 56 N. W. 1046, Mikell Illus. Cas. Criminal Law, 152.

[50] People v. Nolan, 22 Mich. 229; Com. v. Stephenson, 8 Pick. (Mass.) 354.

[51] State v. Moore, 117 Mo. 395, 22 S. W. 1086; State v. O'Brien, 81 Iowa, 93, 46 N. W. 861.

[52] Kent v. State, 84 Ga. 438, 11 S. E. 355, 20 Am. St. Rep. 376; Lyons v. People, 68 Ill. 271; State v. Reid, 20 Iowa, 413; Hild v. State, 67 Ala. 39; Finch v. Com., 14 Grat. (Va.) 643; State v. Groning, 33 Kan. 18, 5 Pac. 446; State v. Conners, 95 Iowa, 485, 64 N. W. 295; Ferguson v. State, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512 (although entrance might have been effected through open door).

[53] Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; Dennis v. People, 27 Mich. 151. But not if the transom is open, McGrath v. State, 25 Neb. 780, 41 N. W. 780.

[54] Reg. v. Bird, 9 Car. & P. 44. The breaking may be by burning to effect an entrance. White v. State, 49 Ala. 344. Opening a screen door kept in place only by springs is a breaking, though the permanent door is already open. State v. Conners, 95 Iowa, 485, 64 N. W. 295.

the house is not sufficient.[55] Nor is it sufficient where an area gate or gate leading into the yard is broken, and the house entered without breaking.[56]

It is doubtful whether a breaking out of a house, after an entry made without breaking, was burglary at common law.[57] It was made so in England by an early statute,[58] but this statute is not generally regarded in this country as part of our common law. In many states breaking out after commission of a felony within the house is made burglary by statute.

Same—Constructive Breaking

The breaking need not be actual, but may be constructive; as where entry is effected by fraud or threats. Thus, one who, with intent to commit a felony in a house, knocks at the door, and, on its being opened by the owner of the house, rushes in, constructively breaks in.[59] The entry,

[55] 2 East, P. C. 488; Case of Gibbons, Fost. Crown Law, 109; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; State v. Scripture, 42 N. H. 485.

[56] Rex v. Davis, Russ. & R. 322; Rex v. Bennett, Russ. & R. 288.

[57] Held not to be in Adkinson v. State, 5 Baxt. (Tenn.) 569, 30 Am. Rep. 69; State v. McPherson, 70 N. C. 239, 16 Am. Rep. 769; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758; Brown v. State, 55 Ala. 123, 28 Am. Rep. 693; White v. State, 51 Ga. 285. Contra, State v. Ward, 43 Conn. 489, 21 Am. Rep. 665; State v. Bee, 29 S. C. 81, 6 S. E. 911. Where a defendant entered a building through an open door, closed it, reopened it after committing larceny within the building, and escaped through the doorway, it was held that this was not burglary under a statute providing that "a person who * * * being in any building commits a crime therein and breaks out of the same is guilty of burglary in the third degree." But otherwise, if the owner had closed the door, and the defendant in escaping opened it. People v. Toland, 165 App. Div. 795, 151 N. Y. Supp. 482.

[58] 12 Anne, c. 1, § 7 (1713).

[59] 1 Hawk. P. C. c. 38, § 5; 4 Bl. Comm. 226, 227; Le Mott's Case,

however, must be made before the owner has had time to fasten the door after the opening thus fraudulently procured.[60] One may also constructively break into a house by getting in under false pretenses, with intent to commit a felony therein; as, for instance, where he pretends that he has business with the owner of the house, or where he conceals himself in a chest, and thus gains access.[61] Another instance is where a person enters by means of an accomplice on the inside;[62] as where he enters under a preconcerted agreement with a servant or apprentice, who unlocks and opens the door for him.[63]

Entry

An entry is also necessary to constitute the crime of burglary.[64] Breaking without entering is not burglary, but any entry, however slight, after a breaking, is sufficient; as, for instance, where a head, a hand, an arm, a foot, or even a finger is thrust within the house.[65] Getting part of the way down a chimney has been held a sufficient entry, though the burglar got

Kel. J. 42; State v. Henry, 31 N. C. 463. Entry obtained by intimidation, see State v. Foster, 129 N. C. 704, 40 S. E. 209.

[60] State v. Henry, 31 N. C. 463.

[61] Johnston v. Com., 85 Pa. 54, 27 Am. Rep. 622; State v. Mordecai, 68 N. C. 207; State v. Johnson, 61 N. C. 186, 93 Am. Dec. 587; Nicholls v. State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870; Ducher v. State, 18 Ohio, 308, 317.

[62] Com. v. Lowrey, 158 Mass. 18, 32 N. E. 940.

[63] State v. Rowe, 98 N. C. 629, 4 S. E. 506. See, also, post, p. 304.

[64] By statute in some states there need not be both a breaking and an entry; either is sufficient to constitute burglary. Minter v. State, 71 Ark. 178, 71 S. W. 944.

[65] Rex v. Perkes, 1 Car. & P. 300; Reg. v. O'Brien, 4 Cox, Cr. Cas. 398; Harrison v. State, 20 Tex. App. 387, 54 Am. Rep. 529; Franco v. State, 42 Tex. 276; Com. v. Glover, 111 Mass. 395; Rex v. Davis, Russ. & R. 499.

stuck, and could not get into any of the rooms.[66] Entry from the outside of a cellar under a dwelling house is an entry of the dwelling.[67] The entry may be made by an instrument instead of the body, but in such case, to be an entry, the instrument must be inserted, not merely for the purpose of breaking, but for the purpose of committing the contemplated felony. Thus, to thrust a hook through a pane of glass for the purpose of lifting the inside latch would not be an entry; but if the hook were inserted for the purpose of taking away goods it would be otherwise. If a pistol were used to effect an entrance, it would not constitute a felony; but if it were pushed inside of the house to kill the inmate, it would.[68] On this principle it is burglary to bore a hole from below into a building for the purpose of stealing grain, and the grain withdrawn by allowing it to fall into a sack, though no portion of defendant's body was within the house.[69] The entry need not be at the same time, nor immediately follow the breaking, provided both be in the night. Breaking on one night and entering the next is burglary.[70]

[66] Brice's Case, Russ. & R. 450; Olds v. State, 97 Ala. 81, 12 South. 409.

[67] Mitchell v. Com., 88 Ky. 349, 11 S. W. 209.

[68] Resolution of Judges, Anderson, 114; 2 East, P. C. 490; Rex v. Hughes, 2 East, P. C. 491; State v. McCall, 4 Ala. 643, 39 Am. Dec. 314; Rex v. Bailey, Russ. & R. 341; Rex v. Rust, 1 Moody, Cr. Cas. 183. But see Reg. v. Wheeldon, 8 Car. & P. 747; Reg. v. O'Brien, 4 Cox, Cr. Cas. 400. East and Hawkins both hold that, if a man shoot from the outside of a house and the bullet comes in, it is a burglary. 2 East, P. C. 490; 1 Hawk. P. C. c. 17. So held in Holland v. State, 55 Tex. Cr. R. 27, 115 S. W. 48.

[69] Walker v. State, 63 Ala. 49, 35 Am. Rep. 1. See, also, STATE v. CRAWFORD, 8 N. D. 539, 80 N. W. 193, 46 L. R. A. 312, 73 Am. St. Rep. 772, Mikell Illus. Cas. Criminal Law, 154.

[70] Com. v. Glover, 111 Mass. 395; Rex v. Smith, Russ. & R. 341. And see People v. Gibson, 58 Mich. 368, 25 N. W. 316.

Character and Occupancy of Premises

The house broken must, at common law, be a dwelling house or an outhouse within the curtilage.[71] Any building within the curtilage is within the definition.[72] It is not necessary that the dwelling be at the time occupied, provided, however, the tenants are only temporarily absent;[73] if they never entered into occupancy, or have left with no intention

[71] Fisher v. State, 43 Ala. 17; State v. Outlaw, 72 N. C. 598; State v. Potts, 75 N. C. 129; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34; Rex v. Gibbons, Russ. & R. 442; Rex v. Martin, Russ. & R. 108. A room or rooms in an apartment or tenement house, rented to separate families, and with a door and entry common to all, constitute each the dwelling house of the particular occupant, within the meaning of the law. People v. Bush, 3 Parker, Cr. R. (N. Y.) 556; Mason v. People, 26 N. Y. 200; 1 Hale, P. C. 556. Burglary may be committed in a city house to which the owner has removed his furniture with the intention of occupying it after his return from his summer residence, though he has never lodged in the house. Com. v. Brown, 3 Rawle (Pa.) 207.

[72] 4 Bl. Comm. 225; 2 Russ. Crimes, 14; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714. What within the curtilage, State v. Sampson, 12 S. C. 567, 32 Am. Rep. 513. A barn, People v. Aplin, 86 Mich. 393, 49 N. W. 148; Pitcher v. People, 16 Mich. 142. Entering at back of outhouse, the front part of which is within the curtilage, is burglary. Fisher v. State, 43 Ala. 17. Entering a barn in a different inclosure from the dwelling is not burglary. Whalen v. Com. (Ky.) 32 S. W. 1095. Accused broke into and entered a meat house situated in the yard in which the owner's dwelling had stood. The dwelling had been burned a short time previous, and the owner was at the time of the breaking living in a schoolhouse three hundred yards distant, on land not owned by him, but was still using the meat house in conjunction with his new, as he had with the old, residence. It was held that the meat house was appurtenant to and part of his dwelling, and that accused was guilty of burglary. Unseld v. Com., 140 Ky. 529, 131 S. W. 263, 140 Am. St. Rep. 393.

[73] Anon., Moore, 660, pl. 903; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109. And see Stupetski v. Transatlantic F. Ins. Co., 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195; Schwabacher v. People, 165 Ill. 618, 46 N. E. 809. See, also, ante, p. 288, notes 9 and 10.

of returning, the building is not a dwelling.[74] A store, in which a person habitually sleeps as watchman is a dwelling.[75] And so, also, a store, with sleeping apartments above or in the rear, may be a dwelling.[76] The breaking and entry may be into part of a house by one who has a right to be in the other part; as, for instance, where a guest at a hotel breaks into the room of another guest,[77] or where a servant breaks into the room of one of the inmates.[78] The rules as to the character and occupancy of the premises, and as to breaking into outhouses within the curtilage, are very much the same as in case of arson; so it is unnecessary to repeat what has been said in treating of that crime. What was said there and the cases cited, are applicable here.[79]

Nighttime

At common law, breaking and entering a dwelling house in the daytime is not burglary. The breaking and entry must both be in the nighttime, though not necessarily on the same night. According to the common law, nighttime begins when daylight ends, or when the countenance

[74] Rex v. Lyons, Leach (4th Ed.) 185; Rex v. Davies, Id. 876.

[75] State v. Williams, 90 N. C. 724, 47 Am. Rep. 541. But see Rex v. Flannagan, Russ. & Ry. 187.

[76] People v. Griffin, 77 Mich. 585, 43 N. W. 1061. And see Moore v. People, 47 Mich. 639, 11 N. W. 415; QUINN v. PEOPLE, 71 N. Y. 561, 27 Am. Rep. 87, Mikell Illus. Cas. Criminal Law, 156. But see People v. Calderwood, 66 Mich. 92, 33 N. W. 23.

[77] State v. Clark, 42 Vt. 629; People v. Carr, 255 Ill. 203, 99 N. E. 357, 41 L. R. A. (N. S.) 1209, Ann. Cas. 1913D, 864. See note 71. But in such case the entry must be into a room where the guest has no right to enter. See STATE v. MOORE, 12 N. H. 42, Mikell Illus. Cas. Criminal Law, 155.

[78] Rex v. Gray, 1 Strange, 481; Colbert v. State, 91 Ga. 705, 17 S. E. 840. In Edmond's Case, Hutton, 20, a servant broke a stairway door and entered his master's room with intent to kill him. Held burglary.

[79] Ante, p. 288.

ceases to be reasonably discernible by the light of the sun, and ends at earliest dawn, or as soon as the countenance becomes discernible; and the fact that it is bright moonlight, or that the place around the house is brightly lighted by artificial light is immaterial.[80] "Nighttime" is defined by statute in some of the states.

Intent

There must be an intent to commit a felony within the house,[81] and, where the breaking and entry are at different times, both must be done with such intent.[82] No other intent, however wrong it may be, will suffice. The intent may, and necessarily must in most cases, be inferred from the facts; as from the fact that a felony is actually committed or attempted, or from the fact that the entry is in the nighttime, but such facts raise only a presumption of intent, and are rebuttable.[83] Burglary is generally committed with intent to steal, but there are frequent cases where the intent is to rape or commit other crimes.[84] Breaking and entry with intent to commit a misdemeanor is not burglary. Entry with intent to steal less than ten dollars, such a larceny being by statute a misdemeanor only, would not be

[80] 4 Bl. Comm. 224; 3 Inst. 63; State v. Bancroft, 10 N. H. 105; People v. Griffin, 19 Cal. 578; State v. Morris, 47 Conn. 179; Laws v. State, 26 Tex. App. 643, 10 S. W. 220; Ashford v. State, 36 Neb. 38, 53 N. W. 1036; State v. McKnight, 111 N. C. 690, 16 S. E. 319.

[81] Dobb's Case, 2 East, P. C. 513; Com. v. Newell, 7 Mass. 245; State v. Cooper, 16 Vt. 551; Price v. People, 109 Ill. 109; State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

[82] STATE v. MOORE, 12 N. H. 42, Mikell Illus. Cas. Criminal Law, 155.

[83] Steadman v. State, 81 Ga. 736, 8 S. E. 420; State v. Fox, 80 Iowa, 312, 45 N. W. 874, 20 Am. St. Rep. 425; Alexander v. State, 31 Tex. Cr. R. 359, 20 S. W. 756.

[84] Harvey v. State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229; Walton v. State, 29 Tex. App. 163, 15 S. W. 646; Williams v. State (Tex. App.) 13 S. W. 609.

burglary, but it has been held otherwise if the intending thief did not know the amount of money in the house, and intended to steal whatever he might find.[86] The intent must exist at the time of the breaking and entry. If it is conceived for the first time after entry, and carried out, the crime is not committed.[86] If the felonious intent exists at the time of the breaking and entry, the offense is none the less burglary because the offender is interrupted and frightened off before he has carried out his intent, or because he changes his intent afterwards, or because, in case of intent to steal, there is nothing in the house to be stolen.[87]

Statutory Changes

In many of the states, statutes have been passed declaring it to be burglary for a person to break into other places than a dwelling house, as, for instance, into warehouses, shops, railroad cars, etc., and to break and enter in the daytime as well as at night. In some states burglary, like arson, has been divided into degrees.

Consent to Breaking and Entry

We have seen that, if a person gets into a house by trick or fraud with intent to commit a felony therein, he con-

[86] Harvick v. State, 49 Ark. 514, 6 S. W. 19. Where information charges intent to steal, it is necessary to prove that the property possessed some value, and was within the building. Bergeron v. State, 53 Neb. 752, 74 N. W. 253. In Harvick v. State, supra, the court said: "The prisoner intended to take all the money there was in the safe. He testified to that fact on the stand. He did not know that it contained less than ten dollars. His intent was to take more than that sum if he could find it; hence the intent to commit a felony."

[86] STATE v. MOORE, 12 N. H. 42, Mikell Illus. Cas. Criminal Law, 155.

[87] Hunter v. State, 29 Ind. 80; Lanier v. State, 76 Ga. 304; State v. Beal, 37 Ohio St. 108, 41 Am. Rep. 490; State v. McDaniel, 60 N. C. 249.

structively breaks in and commits burglary, though the door may be opened for him by the occupant; and that he may also constructively break in by having the door opened by an accomplice on the inside, or by a servant or apprentice of the occupant, under a preconcerted arrangement with him.[88] There is still another way in which the question of consent to the entry may arise. If the owner of a house, knowing that a burglary is to be committed, merely fails to take any steps to prevent it, but lies in wait for the purpose of apprehending the burglar, he does not thereby consent to the breaking and entry, and it will be burglary.[89] If, on the other hand, he takes active steps to aid the intending burglar, as, for instance, where he unlocks the door to admit him, or instructs his servant to do so, his consent prevents the entry from being burglarious.[90] It has also been held that if the owner of a house, or his servant by his authority, instigates a person to break and enter for the purpose of stealing, the latter is not criminally liable.[91]

[88] Ante, p. 297.

[89] Rex v. Bigley, 1 Craw. & D. 202; State v. Covington, 2 Bailey (S. C.) 569; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 364; State v. Sneff, 22 Neb. 481, 35 N. W. 219; State v. Abley, 109 Iowa, 61, 80 N. W. 225, 46 L. R. A. 862, 77 Am. St. Rep. 520.

[90] Rex v. Egginton, 2 Leach, 913; Allen v. State, 40 Ala. 334, 91 Am. Dec. 477; SPEIDEN v. STATE, 3 Tex. App. 157, 30 Am. Rep. 126, Mikell Illus. Cas. Criminal Law, 8; 1 Bish. New Cr. Law, § 262, and cases cited. Otherwise where servant acts without authority. State v. Abley, supra.

[91] People v. McCord, 76 Mich. 200, 42 N. W. 1106. A person who had previously warned railroad officials that a burglary would be committed that night induced the accused to break open a railroad warehouse at night and take property therefrom. It was held that, as the instigator was neither employed by nor authorized by the railroad company so to break and enter, the accused was guilty. Mere knowledge of the proposed entry did not constitute consent thereto. Gentry v. State, 102 Miss. 630, 59 South. 853.

CHAPTER XI

OFFENSES AGAINST PROPERTY

94–98. Larceny.
99–100. Embezzlement.
101–102. Cheating at Common Law.
103–104. Cheating by False Pretenses.
105–107. Robbery.
108–109. Receiving Stolen Goods.
110. Malicious Mischief.
111–113. Forgery.
114. Uttering Forged Instrument.

LARCENY

94. Larceny, at common law, is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein.[1]

95. To constitute the crime

(a) The thing taken must be the personal property of another, and therefore

(1) It must be a thing which the law regards as property.

[1] 2 Bish. New Cr. Law, § 758. Mr. Bishop adds: "And perhaps it should be added, for the sake of some advantage to the trespasser —a question on which the decisions are not harmonious." The following are some of the older definitions: "Larceny, by the common law, is the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another." 3 Co. Inst. 107. "The felonious taking and carrying away of the personal goods of another." 4 Bl. Comm. 229. "The wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, with-

(2) It must be personal, and not real, property.
(3) It must be generally or specially owned by another.

(b) It must be taken
(1) From the actual or constructive possession of the owner.
(2) By trespass.

(c) It must be carried away from the place it occupies, but any removal, however slight, is sufficient.

(d) The intent
(1) Must be to deprive the owner permanently of his property.
(2) It must exist at the time of the taking.
(3) In most jurisdictions the taking need not be lucri causa; that is, for the advantage of the thief. It need never be for his pecuniary advantage.

96. Larceny at common law was divided into
(a) Grand larceny, and
(b) Petit larceny, according to the value of the property stolen, but the distinction has been abolished in many jurisdictions.

97. Larceny, both at common law and by statute, is either
(a) Simple, that is, where there are no aggravating circumstances; or

out the consent of the owner." 2 East, P. C. 553. "The definitions of larceny are none of them complete. Mr. East's is the most so, but that wants some little explanation. His definition is: [Quoting East's definition above.] This is defective in not stating what the definition of 'felonious' in this definition is. It may be explained to mean that there is no color of right or excuse for the act; and the intent must be to deprive the owner, not temporarily, but permanently, of his property." Parke, B., in Reg. v. Holloway, 2 Car. & K. 946.

(b) Compound, that is, where there are such circumstances.

98. Larceny is a felony at common law.

Property That may be Stolen

As larceny is the taking of the property of another, it can only be committed by taking something which the law regards as property, and deems capable of being owned. For this reason seaweed, not reduced to possession,[2] treasure trove and wreck, not seized, are said not to be the subject of larceny.[3] It has often been said that the dead body of a human being cannot be stolen,[4] either because it is not property or because it can have no owner. But now that dead bodies, or portions of bodies, are bequeathed to scientific associations for experimentation, and even bought and sold, there seems no reason why they should not be subject to the law of larceny. There is no reason why one who rifles a museum of the mummy of an Egyptian queen or the skull of a famous scientist should not be guilty of larceny. Even the old authorities would hold him guilty of larceny in taking the grave clothes with which the dead body was covered.[5]

[2] Reg. v. Clinton, 4 Ir. Com. L. 6.

[3] 1 Hale, P. C. 510. The reason given why treasure trove and wreck are not the subjects of larceny is that no one hath any determinate property in them. 1 Hale, P. C. 510. East points out that the fact that the owner is unknown does not prevent the taking being larceny, for lost goods may be stolen (post, p. 328), and intimates what should be the true rule, viz., that only where the circumstances show that the true owner has abandoned the wreck or treasure trove is a conviction of larceny impossible. 2 East, P. C. 606. An estray is the subject of larceny. Crockford v. State, 73 Neb. 1, 102 N. W. 70, 119 Am. St. Rep. 876. A constitutional provision that timber on a forest reserve shall not be sold does not take such timber out of the category of "property," or deprive it of value. It is still the subject of larceny. People v. Gaylord, 139 App. Div. 814, 124 N. Y. Supp. 517.

[4] 2 East, P. C. 652.

[5] Hayne's Case, 12 Coke, 113. In this case it was said the property

It has also been held that a coffin in which a body is buried is the subject of larceny.[6]

Animals feræ naturæ cannot be the subject of larceny at common law, for the law does not regard them as property having an owner; but once reclaimed, if capable of being reclaimed, or reduced into possession, if valuable when killed—as animals fit for food or valuable for their fur—they become property.[7] Thus, deer and other game in the forest, or fish in an open river, cannot be stolen; but if they are killed or caught, or confined in a private park or pond, they become property and the subject of larceny.[8]

in the grave clothes was in the person who owned them before the burial.

[6] State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785.

[7] Reg. v. Shickle, 11 Cox, Cr. Cas. 189. Bees in a hive, State v. Murphy, 8 Blackf. (Ind.) 498. Pea fowls, Anon., Y. B. 19 Hen. VIII. 2, pl. 11; Com. v. Beaman, 8 Gray (Mass.) 497. Pigeons, Reg. v. Cheafor, 5 Cox, Cr. Cas. 367. Doves in a dovecot or nest under care of owner, Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348. Tame bird, HAYWOOD v. STATE, 41 Ark. 479, Mikell Illus. Cas. Criminal Law, 160; Oysters planted in public waters, State v. Taylor, 27 N. J. Law, 117, 72 Am. Dec. 347. But see State v. Johnson, 80 Wash. 522, 141 Pac. 1040. Otter killed, and valuable for fur, State v. House, 65 N. C. 315, 6 Am. Rep. 744. Hawks were the subject of larceny. "Of some things that be feræ naturæ, being reclaimed, felony may be committed in respect of their noble and generous nature and courage, serving of vitæ solatium of princes and noble and generous persons to make them fitter for great employments, as all kinds of falcons and other hawks, if the party that steals them know they be reclaimed." 3 Co. Inst. 109. The older books laid down the rule that no wild animals or birds, except falcons or hawks, were subject of larceny, even when reclaimed, unless fit for food. In HAYWOOD v. STATE, supra, the court repudiated this test, and held that a tame mocking bird was the subject of larceny, and in State v. Taylor, supra, that an otter was the subject of the offense.

[8] Reg. v. Townley, 12 Cox, Cr. Cas. 59. Animals feræ naturæ may be the subject of larceny, when confined in a man's private inclosure, although they are not absolutely secured against the possibility of escape, State v. Shaw, 67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481.

Animals feræ naturæ, if killed on another's land, and allowed to lie there, would, if fit for food, become the property of the owner of the land. If, therefore, a poacher kills a wild animal or bird on another's preserves, and, leaving it on the ıises, abandons it, and afterwards returns and carries it he commits larceny; but it is otherwise if he carries it ıs soon as he kills it, so that the killing and carrying y may be regarded as one and the same act.[9] The same applies here as in case of fixtures severed from the free-, which we shall presently discuss.[10] At common law, ıin animals, such as dogs, cats, ferrets, and the like, were to be of so base a nature as to be incapable of becoming ɔerty, and cannot be stolen;[11] but all of these rules are ıtly modified by statute, both in England and with us. ;s, it has been held, being made taxable by statute, be-ıe property, and therefore the subject of larceny.[12] It is

Reg. v. Townley, 12 Cox, Cr. Cas. 59; Reg. v. Petch, 14 Cox, Cr. 116. Post, p. 313. In Reg. v. Townley, supra, the defendant d a large number of rabbits on the land of another. He tied a together, hid them in a ditch, went off the land, returned, and them out of the ditch. It was held that as he had no intent to ıdon the rabbits, but was using the land of the owner (the ditch) . place of deposit for his own convenience, the killing and carry-away must be regarded as one continuous act.

[9] See post, p. 312, notes 24–32.

[10] 4 Bl. Comm. 236; Reg. v. Robinson, Bell, Cr. Cas. 34; Rex v. ring, Russ. & R. 350 (ferret); Ward v. State, 48 Ala. 161, 17 Am. . 31 (dog); Warren v. State, 1 G. Greene (Iowa) 106, 111 (coon); ton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573; State v. Lymus, 26 o St. 400, 20 Am. Rep. 772 (dog); State v. Holder, 81 N. C. 527, Am. Rep. 517 (dog); Findlay v. Bear, 8 Serg. & R. (Pa.) 571 (dog).

[11] Com. v. Hazlewood, 84 Ky. 681, 2 S. W. 489; People v. Maloney, arker, Cr. R. (N. Y.) 593; People v. Campbell, 4 Parker, Cr. R. Y.) 386; Mullaly v. People, 86 N. Y. 365; State v. Brown, 9 Baxt. nn.) 53, 40 Am. Rep. 81; Harrington v. Mills, 11 Kan. 480, 15 . Rep. 355. And see Hurley v. State, 30 Tex. App. 333, 17 S. W. , 28 Am. St. Rep. 916. Contra, see cases cited in preceding note.

frequently said that the property must also be of some value,[13] though it may be the very smallest, less than that of any known coin.[14] Since all property is of some value even if infinitesimal, the rule as stated seems to be a matter of words, merely.[15] A bill, note, or other like instrument is not, at common law, the subject of larceny, because it was regarded, not as property, but as mere evidence of property or of some right thereto.[16] If it were a valid instrument, the paper on which it was written was considered to be absorbed into the chose in action and to lose its existence as a piece of papér.[17] If, however, the instrument were invalid,

[13] Hope v. Com., 9 Metc. (Mass.) 134; Payne v. People, 6 Johns. (N. Y.) 103. In the case last cited it was held that it was not larceny to steal a letter having no intrinsic value. Contra, Reg. v. Jones, 2 Car. & K. 236. Under a statute making checks the subject of larceny, it has been held that one may be convicted of stealing an unindorsed check payable to a third person. State v. McClellan, 82 Vt. 361, 73 Atl. 993, 23 L. R. A. (N. S.) 1063.

[14] People v. Wiley, 3 Hill (N. Y.) 194; Wolverton v. Com., 75 Va. 909.

[15] The rule seems to be a rule of procedure rather than of substantive law. It is undoubtedly necessary to allege the value of the property in the indictment, but this was for the reason that the value of the property stolen determined whether the crime was a felony or a misdemeanor, and this the defendant was entitled to know, because his rights were different on the trial for the two classes of crime. Most of the cases which are cited for the proposition that the property must be of some value acquitted the defendant, not because the property he was accused of stealing was of no value, but because it did not answer the description given of it in the indictment. Thus, in State v. Campbell, 103 N. C. 344, 9 S. E. 410, accused was indicted for stealing a duebill previously paid. It was held that, as it was of no value as a duebill, the defendant was not guilty. The court, however, said that he could have been convicted of larceny of the paper on which the bill was written if he had been so charged in the indictment.

[16] See Reg. v. Watts, 6 Cox, Cr. Cas. 304.

[17] 4 Bl. Comm. 234; Reg. v. Watts, 6 Cox, Cr. Cas. 304; Reg. v. Powell, 5 Cox, Cr. Cas. 396; Culp v. State, 1 Port. (Ala.) 33, 26 Am.

and of no value as such, it retained its existence as a piece of paper, and was the subject of larceny.[18] Nor are charters and instruments of title to real estate the subject of larceny, because the writing is evidence of the right or title, and ceases to have existence as anything else.[19] These rules have been changed in many of the states by statutes declaring choses in action, evidences of debt or contract, or articles of value of any kind, to be property which may be stolen.

Property does not cease to be such, and to be the subject of larceny, because it was unlawfully acquired by the person from whom it is taken, or because it is being used by him for an illegal purpose. Thus it is larceny to steal property from one who has himself stolen it.[20] So one may be guilty of larceny in taking instruments used for gambling, though gambling is itself a crime,[21] or in taking intoxicating liquor,[22] or the proceeds from the sale thereof,[23] from one who is engaged in selling it contrary to law.

Same—Personal Property

Larceny is the taking of "personal" property; and the crime, therefore, is not committed at common law by tak-

Dec. 357; U. S. v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930; Payne v. People, 6 Johns. (N. Y.) 103.

[18] Reg. v. Perry, 1 Denison, Cr. Cas. 69, 1 Car. & K. 725. See Reg. v. Watts, supra. So of a note which has been paid. Rex v. Vyse, 1 Moody, Cr. Cas. 218. Postage stamps, unissued (under statute) Jolly v. U. S., 170 U. S. 402, 18 Sup. Ct. 624, 42 L. Ed. 1085.

[19] 4 Bl. Comm. 234; Rex v. Westbeer, 2 Strange, 1133. An earlier reason was because they partake of the nature of the land. Rex v. Wody, Y. B. 10 Edw. IV. 14, pl. 9, 10. See Reg. v. Powell, 5 Cox, Cr. Cas. 397; Reg. v. Watts, supra.

[20] Ward v. People, 3 Hill (N. Y.) 395.

[21] Bales v. State, 3 W. Va. 685.

[22] State v. May, 20 Iowa, 305; Com. v. Coffee, 9 Gray (Mass.) 139.

[23] Com. v. Rourke, 10 Cush. (Mass.) 397.

ing property which is attached to the soil or freehold, such as trees, doors, window blinds, mantels, pipes, and the like.[24] If a thing attached to the realty is severed, thereby becoming personal property, it may be stolen.[25] Neither ore before it has been mined nor ice before it has been cut is the subject of larceny; but it is otherwise if the ore has become detached or the ice cut and stored.[26] Where, however, the severance is by a trespasser, who carries the thing away, the taking and carrying away is mere trespass, and not larceny; if the severance and carrying away are one continuous transaction.[27] It was once held that the two acts must be separated by a day in order to make them distinct transactions;[28] but no particular length of time is neces-

[24] Anon., Y. B. 11, 12 Edw. III, 640. Rex v. Westbeer, 1 Leach, 14; 2 East, P. C. 596. A key may be stolen, Hoskins v. Tarrence, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129, so, also, chandeliers attached to the freehold, as they remain furniture, and do not become part of the realty, Smith v. Com., 14 Bush (Ky.) 31, 29 Am. Rep. 402. Valves attached to pump and boiler used as a permanent improvement for irrigating purposes, but removable, not part of freehold, Langston v. State, 96 Ala. 44, 11 South. 334; otherwise where they are screwed to pipes attached to the side of a building, Id. Wire fastened to posts for the purpose of fencing a pasture for live stock is personal property, and a subject of larceny. Junod v. State, 73 Neb. 208, 102 N. W. 462, 119 Am. St. Rep. 890.

[25] Reg. v. Wortley, 1 Denison, Cr. Cas. 162; People v. Williams, 35 Cal. 671 (ore); State v. Burt, 64 N. C. 619; State v. Berryman, 8 Nev. 262; Holly v. State, 54 Ala. 238. Turpentine after being taken from tree, State v. Moore, 33 N. C. 70.

[26] People v. Williams, 35 Cal. 671; Ward v. People, 3 Hill. (N. Y.) 395; State v. Burt, 64 N. C. 619; State v. Berryman, 8 Nev. 262; COM. v. STEIMLING, 156 Pa. 400, 27 Atl. 297, Mikell Illus. Cas. Criminal Law, 162; Ward v. People, 6 Hill (N. Y.) 144.

[27] 4 Bl. Comm. 232; Reg. v. Townley, 12 Cox, Cr. Cas. 59; State v. Hall, 5 Har. (Del.) 492; State v. Burt, 64 N. C. 619; Jackson v. State, 11 Ohio St. 104; Bradford v. State, 6 Lea (Tenn.) 634; People v. Williams, 35 Cal. 671.

[28] 2 Bish. New Cr. Law, § 766.

sary. It is enough if the two acts do not constitute one transaction.[29] The technical reason why the two acts must be distinct is that, if the thing severed is carried away as part of one continuous transaction, it never comes into the possession of the owner as personal property, and hence there is no taking of personal property out of his possession. It is essential that the thing severed and carried away should come into the intervening possession of the owner. If the trespasser leaves the thing upon the owner's premises, and abandons it, it then comes into the possession of the owner as personal property, and if the trespasser returns and carries it away he is guilty of larceny.[30] But it has been held that merely leaving the thing on the owner's premises does not of itself vest possession in the owner, so as to make the reoccupation by the trespasser larceny. Thus, where trespassers hid the thing on the premises with the intention of returning for it, and returned after several hours and carried it away, it was held that the transaction was continuous and did not amount to larceny.[31] In many states it is by statute made larceny to take and carry away fixtures, growing trees, and other

[29] See cases generally cited under this paragraph.

[30] Reg. v. Foley, 26 L. R. Ir. 299.

[31] Reg. v. Townley, 12 Cox, Cr. Cas. 59; Reg. v. Petch, 14 Cox, Cr. Cas. 116. These cases related to rabbits killed and concealed on the premises by poachers, but the same principles are applicable. Where defendant gathered coal which had been deposited by a stream on the prosecutor's land, sifted the coal, and deposited it and carried it away in a flatboat, he was guilty of larceny. COM. v. STEIMLING, 156 Pa. 400, 27 Atl. 297, Mikell Illus. Cas. Criminal Law, 162. In Reg. v. Foley, 26 L. R. Ir. 299, accused, a former tenant, re-entered the premises and cut grass belonging to the landlord; three days later he again entered, raked the grass and carted it away. It was held that Foley's possession of the grass was not continuous, and the fact that he intended, when he cut the grass, to return for it, did not prevent his act of carrying it away from being larceny.

things attached to realty, although the severance and carrying away are one and the same transaction. Illuminating gas and water, when collected for supply, are such property as may be stolen.[82]

Same—Property of Another

Although, as stated in the black-letter text, the ownership of the stolen property must be in another than the thief,[83] it is not necessary that the owner shall be known.[84] Nor is it necessary that the stealing shall be from the holder of the legal title. The ownership may be special as well as general,[85] as in case of bailment. Thus, property may be stolen from a bailee and it may be charged in the indictment to have been his property;[86] property may be stolen

[82] Ferens v. O'Brien, 11 Q. B. Div. 21; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706; Hutchison v. Com., 82 Pa. 472; Reg. v. White, 6 Cox, Cr. Cas. 213; State v. Wellman, 34 Minn. 221, 25 N. W. 395.

[83] Benton v. State, 21 Tex. App. 554, 2 S. W. 885; Burton v. State (Tex. App.) 1 S. W. 450. Larceny by vendor of the property; the contract of sale must be complete. Love v. State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234. An assignment of his unearned salary by a government employé being void as against public policy, he does not commit larceny by converting it. State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358.

[84] See post, pp. 328–332. A recent case holds that a conviction of larceny cannot be had on proof of mere possession by another of the article taken, but that it must be proved that the person in possession was the owner. State v. James, 133 Mo. App. 300, 113 S. W. 232.

[85] Com. v. O'Hara, 10 Gray (Mass.) 469; State v. Mullen, 30 Iowa, 203; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; State v. Gorham, 55 N. H. 152; State v. Furlong, 19 Me. 225; Owen v. State, 6 Humph. (Tenn.) 330; State v. Somerville, 21 Me. 14, 38 Am. Dec. 248; Quinn v. People, 123 Ill. 333, 15 N. E. 46.

[86] Rex v. Bramley, Russ. & R. 478; Reg. v. Webster, 9 Cox, Cr. Cas. 13; Kennedy v. State, 31 Fla. 428, 12 South. 858; State v. McRae, 111 N. C. 665, 16 S. E. 173; State v. Allen, 103 N. C. 433, 9 S. E. 626.

from one who had himself stolen it, and described as his;[37] clothing stolen from the body of a dead person may be charged as the property of his executors.[38] Property in the hands of a bailee may be stolen by the general owner; as, for instance, where it is taken with intent to charge the bailee with its value.[39]

Ordinarily one joint owner of property is not guilty of larceny in taking the property from another joint owner, because each joint owner has the right to possession of the property.[40] But since the owner of property may be guilty

[37] Com. v. Finn, 108 Mass. 466; Ward v. People, 3 Hill (N. Y.) 396.

[38] Haynes' Case, 12 Coke, 113. One who has taken an estray and is in possession thereof has such a property interest in it that the taking of it from him may be larceny. Maxwell v. Territory, 10 Ariz. 1, 85 Pac. 116.

[39] 2 East, P. C. 654; Rex v. Bramley, Russ. & R. 478; Palmer v. People, 10 Wend. (N. Y.) 166, 25 Am. Dec. 551; People v. Thompson, 34 Cal. 671; Com. v. Greene, 111 Mass. 392; People v. Wiley, 3 Hill (N. Y.) 194; Com. v. Tobin, 2 Brewst. (Pa.) 570; Henry v. State, 110 Ga. 750, 36 S. E. 55, 78 Am. St. Rep. 137. Or to remove property clandestinely from the rightful possession of one who has a valid lien upon it, People v. Long, 50 Mich. 249, 15 N. W. 105. Retaking property after surrendering it to receiver thereof, State v. Rivers, 60 Iowa, 381, 13 N. W. 73, 14 N. W. 738. Larceny by pledgor from pledgee, Bruley v. Rose, 57 Iowa, 651, 11 N. W. 629. Larceny by taking one's own goods which have been levied on under execution. Adams v. State, 45 N. J. Law, 448. In the case last cited defendant boarded with prosecutrix and had delivered to her a bicycle as security for his board. The bicycle was kept by her in her son's room, but defendant was allowed to use it. Defendant sold the bicycle, and it was held that he was guilty of larceny in so doing. In State v. Nelson, 36 Wash. 126, 78 Pac. 790, 68 L. R. A. 283, 104 Am. St. Rep. 945, the owner of a horse was convicted of stealing it from a livery stable keeper, who had boarded it and had a lien on it for the amount of the board.

[40] Bell v. State, 7 Tex. App. 25; Fairy v. State, 18 Tex. App. 314; State v. Kent, 22 Minn. 41, 21 Am. Rep. 764; Com. v. Superintendent of Philadelphia County Prison, 9 Phila. (Pa.) 581. In State v. Kent, supra, defendant was a collector of pew rents for a church under a

of larceny in taking his own property from a bailee, there is no reason why a joint owner may not be guilty of larceny from another joint owner, if the latter occupies the position of a bailee of the property as to the other owner.[41]

At common law, husband and wife cannot steal each other's goods, as they are regarded in law as one person.[42] It has been held in some of the cases that a third person who assists the wife to take her husband's goods without the husband's consent, or even receives them from her, is guilty of larceny if the wife has committed adultery with such person.[43] Other cases hold that, since the wife cannot steal

contract which entitled him to five per cent. of all pew rents collected. He abstracted some of the money collected. It was held that he was not guilty of embezzlement.

[41] Reg. v. Webster, 9 Cox, Cr. Cas. 13; Pennsylvania v. Campbell, Add. (Pa.) 232; Rex v. Burgess, Leigh & C. 299. In Reg. v. Webster, supra, the defendant was a member of a society or club which conducted a shop for profit. As a member he was entitled to a share in the profits arising from the business. He took money arising from a sale of goods, from the till in the shop. It was held that he was guilty of larceny.

[42] Reg. v. Kenny, 13 Cox, Cr. Cas. 397; Reg. v. Tollett, Car. & M. 112; Rex v. Willis, 1 Moody, Cr. Cas. 375; Lamphier v. State, 70 Ind. 317; Thomas v. Thomas, 51 Ill. 162; State v. Banks, 48 Ind. 197. Where by statute the husband's interest in his wife's goods and chattels is abolished, it has been held that he may commit larceny by taking them. See, also, Hunt v. State, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33; Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418. Contra, Thomas v. Thomas, 51 Ill. 162; State v. Parker, 3 Ohio Dec. (reprint) 551. And see Com. v. Dingman, 26 Pa. Super. Ct. 615.

[43] Reg. v. Harrison, 12 Cox, Cr. Cas. 19; Reg. v. Thompson, 2 Craw. & D. 491; Rex v. Tolface (semble), 1 Moody, 243; Reg. v. Featherstone, 6 Cox, Cr. Cas. 376; People v. Schuyler, 6 Cow. (N. Y.) 572. (In this case the prisoner actually took some of the goods out of the house with his own hands.) In People v. Cole, 43 N. Y. 508, the prisoner took a bond belonging to the husband. The court held that merely showing that the wife consented to the taking would

from her husband, one who merely aids her to take her husband's goods cannot himself be guilty of larceny in so doing.[44]

The Manner of Taking

Though larceny is generally regarded as a secret crime, and conveys the idea of stealth, it is not necessary that the taking shall be done secretly. An open taking may constitute the crime if there is the necessary animus furandi, or felonious intent,[45] though, of course, the fact that there was no stealth or attempt at concealment may tend to show the absence of such intent; as, for instance, where the accused claims that he in good faith believed that the property was his own, and that he had a right to take it.[46]

The Trespass in Taking

To constitute the crime of larceny at common law, it is essential that the thing shall be taken "by trespass." It has been said that, as the crime always implies a trespass, a person cannot be held guilty except under such circumstances as would render him liable to damages in an action for trespass to goods.[47] Though a person who appropriates an-

not prevent the act from being larceny. See, also, People v. Swalm, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96.

[44] Rex v. Clark, 1 Moody, 376; Reg. v. Avery, 8 Cox, Cr. Cas. 184. A constable, who uses the process of the law for the purpose of obtaining possession of the goods of another, with intent to convert the goods to his own use, is guilty of larceny of the goods, Luddy v. People, 219 Ill. 413, 76 N. E. 581, 8 L. R. A. (N. S.) 508.

[45] Post, p. 341.

[46] State v. Fenn, 41 Conn. 590; State v. Ledford, 67 N. C. 60; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93.

[47] Reg. v. Smith, 2 Denison, Cr. Cas. 449. And see the cases hereinafter cited. Where accused took a bull from a range believing it to be his own, kept it for several months, then learned that it belonged to another, and sold it, he is not guilty of larceny, since the

other's goods to his own use may have the intent necessary to make the appropriation larceny, yet, if there is no trespass in taking the goods, the crime is not committed.

A taking may not be a trespass for two reasons aside from the intent and the act of the taker. In the first place, the possession of the goods may have been lawfully obtained by the person who appropriates them, in which case a trespass by him is impossible, so long as he has such possession; and in the second place, the owner, though in possession, may consent to part with the possession or "property," and if he does so absolutely, and the consent is as broad as the taking, a trespass is not committed. We must therefore consider the question of possession, and the mental attitude of the owner. In doing so, the difference between the meaning of the terms "possession," "custody," and "property" must be kept in mind. A person has the "custody" of a thing as distinguished from the "possession," where, as in case of a servant's custody of his master's goods, he merely has the care and charge of them for the master, who retains the right to control them, and who therefore retains constructive possession. Constructive possession includes not only the possession which a master has of goods in the custody of a servant on the master's account; but it includes the purely fictitious possession which the owner of goods is supposed to have, although they are in reality possessed by no one at all.[48] "Property" means ownership.

Possession Necessary for Trespass to Attach

Since in the law of larceny trespass is an injury to the possession, if the goods which the defendant is accused of

taking was not a trespass. Wilson v. State, 96 Ark. 148, 131 S. W. 336, 41 L. R. A. (N. S.) 549, Ann. Cas. 1912B, 339.

[48] See Steph. Dig. Cr. Law, Append. note xvii.

having stolen have never been in the possession of the owner, there can be no larceny of such goods from him. Thus, if goods have been sold to a person and received lawfully by the accused to deliver to the owner and the accused, instead of delivering them, converts them to his own use, he is not guilty of stealing them. There is no larceny as to the person delivering the goods, because he has voluntarily parted with the possession of them; and no larceny as to the person to whom they were to be delivered, because he has never had possession of them.[49] So, if a person gives goods to a servant to sell and bring back the money, and the servant sell the goods and spend the money on himself, he is not guilty of larceny of either the goods or the money, for the possession of the goods was given him, and the money never came into the possession of the master.[50] Likewise, if a person give another money to get changed and the latter changes the money and converts the change to his own use he is not guilty of larceny as to the change for it never was in the owner's possession.[51]

If the property comes into the owner's possession, however, it is sufficient, though it comes into his possession by the act of the person taking it. Thus, if a clerk receives

[49] See Rex v. Dingley, Show. 53; Pennsylvania v. Campbell, Add. (Pa.) 232.

[50] Rex v. Dingley, Show. 53.

[51] Rex v. Sullens, 1 Moody, 129. In Rex v. Bull, 2 Leach, 841, the owner of a shop suspected the prisoner, who was his clerk, of being engaged in stealing from him. He therefore marked two coins and gave them to a third person to use in purchasing goods from the shop where the prisoner was employed. The customer went to the shop and bought goods from the prisoner, giving him in exchange therefor the marked coins. The prisoner, with fraudulent intent, put the coins in his pocket, instead of in the till. It was held that he could not be convicted of larceny of the coins as they had never reached the master's possession.

money from a customer and puts it into the master's till, and then subsequently takes it out and converts it to his own use, he will be guilty of larceny,[52] though, as we have just seen, if he had put it directly into his own pocket, he would not. So, where a person bought property and gave his servant his cart to bring the property home, and the servant, after putting the property in the cart, sold some of it on the way home, he was held guilty of larceny of the part sold. When it was put into the cart it was in the master's possession.[53]

Same—Possession Obtained without Consent

In order that a thing may be stolen, it is essential that possession be obtained unlawfully; that is, against the will or without the consent of the owner, otherwise there is no trespass. Where a thing is taken out of the actual possession of the owner, and there is nothing to indicate his consent, the trespass or wrongful disturbance of the owner's possession is clear. Thus, a person who picks up goods in a shop, and secretly appropriates them,[54] or who inserts a

[52] See Waites' Case, 2 East, P. C. 571; Rex v. Bazeley, 2 East, P. C. 574; Reg. v. Wright, Dears. & Bell, 431.

[53] Reg. v. Reed, 6 Cox, Cr. Cas. 284. "If the defendant, before he placed the money in the drawer intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it just afterward larceny." Holmes, J., in Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. Rep. 560.

[54] Mitchum v. State, 45 Ala. 29. In this case defendant took from a tobacconist's counter a box of matches placed there for the use of customers, and was held guilty of larceny. The court said: "The owner had not abandoned his right to them. They could only be appropriated in a particular manner, and in a very limited quantity, with his consent. Taking them by the box full without felonious intent would have been a trespass, and with it a larceny." Where the defendant was by agreement allowed to take from the prosecutor's pile of ashes as much as he wanted at a certain price per ton,

metal disk in an automatic slot machine and thereby obtains some thing of value, which the owner intended to part with only to one who placed a coin in the slot, takes the goods by trespass, and is guilty of larceny.[55] Again, if delivery is obtained by putting the owner in fear—as by threats or intimidation—there is no consent, and the taking is by trespass.[56]

Same—Larceny by Bailee

A bailee who is lawfully in possession of a thing, and who appropriates it to his own use, does not commit larceny, because his possession was lawfully obtained;[57] although he may be guilty of a statutory crime under the statutes enacted to fill this gap in the common law.[58] On the other hand, if a person obtains possession of goods or money by trick or fraud, or under false pretense of a bailment, with intent to appropriate the thing to his own use, and the owner intends to part with the possession only, and not with the property, the possession is obtained unlawfully, and the subsequent appropriation in pursuance of the original intent is larceny.[59] Again, a bailee, although he

upon the understanding that the amount taken should be weighed by the prosecutor's agent, who was to enter the weight in a record book, and the weigher in collusion with the defendant entered in the book a ton and a half less than was weighed out, it was held that the defendant was guilty of larceny of the ton and a half, Rex v. Tideswell [1905] 2 K. B. 273.

[55] Reg. v. Hands, 16 Cox, Cr. Cas. 188.

[56] Reg. v. McGrath, L. R. 1 Cr. Cas. 205, 11 Cox, Cr. Cas. 347: Reg. v. Lovell, 8 Q. B. Div. 185 (extorting excessive charge by threats); Reg. v. Hazell, 11 Cox, Cr. Cas. 597.

[57] Raven's Case, J. Kelyng, 24; Leigh's Case, 2 East, P. C. 694; Rex v. Banks, Russ. & R. 441; Reg. v. Thristle, 3 Cox, Cr. Cas. 573 (watch given watchmaker to repair and appropriated); State v. England, 53 N. C. 399, 80 Am. Dec. 334; State v. Fann, 65 N. C. 317.

[58] Post, p. 351.

[59] Where a gypsy, under pretense of raising spirits and recovering

obtain possession lawfully, may be guilty of larceny if he first commits a breach of trust, whereby he is deemed to terminate the bailment—as where a carrier breaks bulk, and afterwards abstracts part of the goods intrusted to him;[60] or a miller separates from the rest part of the grain sent to be ground,[61] thereby determining the bailment, and appropriates that part. It must be admitted that these cases, as do many others involving the question whether larceny is or is not committed, rest upon a highly artificial distinction. "The law has resorted to some astuteness to get rid of the difficulties that might arise in the case of a wrong-

property, induced a woman to give her money, promising to return it, it was held that, if it was a mere trick to induce the woman to part with possession of the money, with no intent to return it, it was larceny. Reg. v. Bunce, 1 Fost. & F. 523. Where defendant obtained a watch and money from a woman by falsely pretending her husband was under arrest, and had sent for money, defendant to pawn the watch and give the money and ticket to the husband, it was held that, if the taking was with felonious intent, it was larceny. Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474. Obtaining goods on pretense of hiring or other bailment with intent to steal. Rex v. Pear, 2 East, P. C. 685; People v. Smith, 23 Cal. 280; Starkie v. Com., 7 Leigh (Va.) 752 (borrowing); State v. Gorman, 2 Nott & McC. (S. C.) 90, 10 Am. Dec. 576; State v. Lindenthall, 5 Rich. (S. C.) 237, 57 Am. Dec. 743. See, also, Com. v. Barry, 124 Mass. 325; Com. v. Lannan, 153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. Rep. 629; Com. v. Flynn, 167 Mass. 460, 45 N. E. 924, 57 Am. St. Rep. 472; Doss v. People, 158 Ill. 660, 41 N. E. 1093, 49 Am. St. Rep. 180 (obtaining money on pretense of bet). Crum v. State, 148 Ind. 401, 47 N. E. 833 ("green goods").

[60] Nichols v. People, 17 N. Y. 114; Com. v. Brown, 4 Mass. 580; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Reg. v. Poyser, 5 Cox, Cr. Cas. 241, 2 Denison, Cr. Cas. 233; Rex v. Brazier, Russ. & R. 337. When bulk not broken, Rex v. Madox, Russ. & R. 92; Rex v. Fletcher, 4 Car. & P. 545; Rex v. Pratley, 5 Car. & P. 533.

[61] Com. v. James, 1 Pick. (Mass.) 375; Cartwright v. Green, 8 Ves. 405. So where one who is intrusted with trunk opens it, and takes

ful dealing with one or more of several articles, all of which, when intrusted, had been contained in one bulk." [62]

The appropriation must be during the bailment, and while the bailee lawfully has possession, or the crime will be larceny, and not embezzlement. Thus, the teller of a bank, if he appropriates money of which he has charge during the business hours, does not commit larceny, as he is then intrusted with the possession; but it is otherwise if he takes the money from the vault after business hours, for then the possession is in the bank.[63] So, also, a clerk intrusted with goods to sell and deal with at his discretion, during business hours only, is guilty of larceny if he enters the store after it has been closed and takes them; whereas, if he appropriates them during business hours, he commits embezzlement only; [64] and the hirer of a horse, if he sells it after termination of the bailment, instead of returning it, commits larceny.[65]

Same—Custody not Possession—Larceny by Servant

A thing need not be in the owner's actual possession in order that a trespass may be committed in taking it. His possession may be constructive.[66] If a master delivers goods to his servant or other agent merely to keep or use for him, and not by way of bailment, he parts with the cus-

money therefrom, Robinson v. State, 1 Cold. (Tenn.) 120, 78 Am. Dec. 487.

[62] Per Lord Campbell, C. J., in Reg. v. Poyser, supra.

[63] Com. v. Barry, 116 Mass. 1.

[64] Com. v. Davis, 104 Mass. 548.

[65] Reg. v. Haigh, 7 Cox, Cr. Cas. 403.

[66] A horse on its accustomed range is in the owner's constructive possession. Burton v. State (Tex. App.) 1 S. W. 450. Client's constructive possession of his property in the hands of his attorney. Com. v. Lannan, 153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. Rep. 629.

tody only, and not the possession. He has constructive possession by his servant. A person, therefore, who takes the goods from the servant, takes them from the possession of the master, and commits a larceny from the master, and not from the servant. The servant himself, also, if he converts the goods to his own use, takes them from the constructive possession of his master, and is guilty of larceny.[67] He is the custodian of the goods, and not a bailee.

A servant, however, may become a bailee, instead of a mere custodian. Thus, where goods are delivered to a servant by a third person, to be delivered to his master, he is merely a bailee until the goods have reached their destination, or something more has happened to reduce him to a mere custodian; and he does not commit larceny if in the meantime he appropriates the goods to his own use; for the master, until the goods are at least constructively received by him, has no possession, either actual or constructive.[68]

[67] 2 East, P. C. 564; 2 Hale, P. C. 506; Anon., J. Kelyng, 35; Rex v. Bass, 1 Leach, 251; Com. v. O'Malley, 97 Mass. 584; Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767; Marcus v. State, 26 Ind. 101; State v. Jarvis, 63 N. C. 556; People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; Crocheron v. State, 86 Ala. 64, 5 South. 649, 11 Am. St. Rep. 18; People v. Belden, 37 Cal. 51; People v. Perini, 94 Cal. 573, 29 Pac. 1027; Jenkins v. State, 62 Wis. 49, 21 N. W. 232; Rex v. Murray, 1 Moody, Cr. Cas. 276; Jones v. State, 59 Ind. 229. Where accused lived with her father and was intrusted with the key to a trunk in which was kept money belonging to the father, which money she used from time to time for her own use and for the use of the family, without objection, a subsequent decamping with the entire fund remaining was held larceny, if done with felonious intent; she being her father's servant, and having bare custody of the money, Jackson v. State, 5 Ala. App. 306, 57 South. 594.

[68] See, supra, p. 318. Com. v. King, 9 Cush. (Mass.) 284; Reg. v. Bazely, 2 Leach, 835; Reg. v. Masters, 1 Denison, Cr. Cas. 332. "This distinction is not very satisfactory, but is due to historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a cap-

If, on the other hand, the goods, when received by the servant from a third person, are delivered to him in a place appropriated by his master for their reception—as a cart, when the servant is sent with a cart to fetch the goods—they then come at once into the master's possession, and a subsequent taking by the servant with intent to steal is larceny.[69]

This distinction between custody and possession is of the utmost importance, for it is often very difficult to determine whether the crime is larceny or embezzlement, each particular case depending upon the peculiar circumstances. To illustrate the doctrine: where a third person hands a clerk money to pay a bill which he owes the clerk's employer, and the clerk, instead of putting the money into his employer's safe or other proper place, puts it into his own pocket, and appropriates it, or hides it on the premises, and afterwards carries it off, he does not commit larceny; for, as the money has not reached its destination, but is merely in transit, the master has not obtained possession, either actual or constructive. If, however, the clerk puts the moneys in the safe, it is in his employer's constructive possession; and if he takes it out again, and converts it, he is guilty of larceny.[70] If it is not the duty of the clerk to put the money in the safe, but he is required to keep it on his person for his master, then, as soon as he receives the money, it has reached its ultimate destination, and he will be guilty if he appropriates it, instead of holding it for his master. If a master gives his servant a check to take to the bank and

ital offense." Per Holmes, J., in Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. Rep. 560.

[69] Supra, p. 319. Reg. v. Watts, 4 Cox, Cr. Cas. 336; Reg. v. Reed, 6 Cox, Cr. Cas. 284 (servant sent with cart for coals); Reg. v. Norval, 1 Cox, Cr. Cas. 95 (goods put in master's cart).

[70] Compare Com. v. Ryan, supra.

get cashed, he has mere custody of the check itself, and commits larceny, if he appropriates it;[71] but if he cashes the check, and appropriates the money, he commits embezzlement only, as the money has never been in the master's possession.[72]

A person other than a regularly employed servant or agent may be only a custodian rather than a bailee, and therefore guilty of larceny in appropriating the goods intrusted to him.[73] The principle seems to be that, where the goods are delivered to the person to be used by him only in the owner's presence, actual or constructive, he has only custody and not possession. If under such circumstances, such person converts to his own use the property thus placed in his charge, whether he had such intention at the time he received it or whether such intention came to him later, he is guilty of larceny. Thus, a guest has bare custody, not possession, of the articles in his room belonging to his host;[74] and if one hands money to another to pass on to a third person, all three being present at the time, the person to whom the owner handed it has only custody.[75] If the owner of a note hands it to another to indorse in his presence, such person has custody only, and is guilty of larceny if he converts it.[76] The same principle applies where

[71] Rex v. Paradice, 2 East, P. C. 565.

[72] See supra, p. 319.

[73] Reg. v. Goode, 1 Car. & M. 582; Anon., Kel. 35; People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; PEOPLE v. MONTARIAL, 120 Cal. 691, 53 Pac. 355, Mikell Illus. Cas. Criminal Law, 168.

[74] Anon., Lib. Ass'n, 137, pl. 39.

[75] Com. v. Lannan, 153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. Rep. 629.

[76] People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; Reg. v. Rodway, 9 Car. & P. In PEOPLE v. MONTARIAL, 120 Cal. 691, 53 Pac. 355, Mikell Illus. Cas. Criminal Law, 168, the prosecutor and the accused had been roommates. The prosecutor gave the accused

a dealer gives goods into a customer's hands for inspection and the customer makes off with them with felonious intent.[77]

Same—Delivery on Condition

Closely analogous to the principle just discussed is another, viz., that where goods are delivered by the owner merely for a temporary purpose and upon a condition, and the other keeps the goods without performing the condition, this is larceny, because the owner consents to transfer merely custody and not possession until the condition is performed. Many of the cases just cited might be decided under either principle. Thus, where a person hands another money to count and return part, or a note to examine, there is no change of possession in the eye of the law, and, if the person runs off with the thing, he is guilty of larceny.[78] So, where goods are sold for cash, and there is a delivery conditional upon receiving immediate payment, although the property passes, subject to the seller's lien, the seller does not part with possession, and relinquish his lien, unless

certain money done up in a package to be placed in the trunk of the accused for safe-keeping. The accused carried the key to the trunk, but had no authority to handle the money, except in the presence of the prosecutor, and then only for the purpose of handing it to the prosecutor and replacing it at his direction. Accused having converted the money, it was held that he had been given only custody, and was guilty of larceny.

[77] Rex v. Chissers, T. Raym. 275. See, also, Reg. v. Slowly, 12 Cox, Cr. Cas. 269; Com. v. O'Malley, 97 Mass. 584.

[78] Reg. v. Thompson, 9 Cox, Cr. Cas. 244; Com. v. Wilde, 5 Gray (Mass.) 83, 66 Am. Dec. 350; Com. v. O'Malley, 97 Mass. 584 (handing money to count and retain part as loan); Ellis v. People, 21 How. Prac. (N. Y.) 359; State v. Fenn, 41 Conn. 590; Com. v. Lester, 129 Mass. 101; People v. Johnson, 91 Cal. 265, 27 Pac. 663 (placing money on table that defendant might illustrate manner of drawings of Louisiana lottery); Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; Levy v. State, 79 Ala. 259.

payment is made; and if the buyer, without making payment, runs off with the goods, he is guilty of larceny.[79] Conversely, if in a cash sale the buyer pays conditionally upon receiving at once the thing sold, and if the seller, without delivering it, runs off with the money, the seller is guilty of larceny. So, if a bill or coin is given in payment, and change is to be returned, the delivery is conditional, and the person handing over the money does not part with the possession until the change is returned.[80]

Same—Larceny by Finder

A distinction is to be made between the taking of goods that have been abandoned by the owner, lost by him, or mislaid. As we have seen, there can be no larceny of abandoned goods. The owner who abandons his goods gives up both the possession and title to any one who chooses to assume them. Therefore he who takes possession does not take the property "of another," nor does he commit any trespass. With goods that are not abandoned, but merely lost by the owner, the case is different. The owner has not lost his title to such goods. Though lost, they are still his, and he who takes them takes the goods "of another," and therefore takes property which is the subject of larceny. It does not follow from this that every taking of lost goods is larceny, for, as we have seen, to constitute larceny there must be a trespass in the taking. Whether there is such

[79] Reg. v. Slowly, 12 Cox, Cr. Cas. 269. Where a finder of money gave it to the defendant's wife, to be returned if it did not belong to the defendant, and the defendant, having no felonious intent, received the money from his wife, and later converted it animo furandi, it was recently held that the defendant had the bare custody and was guilty of larceny. Williams v. State, 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 248.

[80] Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435; State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455.

trespass depends on the circumstances of the case. The question may arise in any one of four ways: (1) The finder may take possession of the goods with the fraudulent intent of keeping them for his own use, even though he should discover the owner. (2) He may take possession with the intention of returning them to the owner if he should discover him. (3) There may be, at the time the finder takes possession, some mark on the goods, or some circumstance which affords the finder a reasonable means of knowing or ascertaining who the owner is. (4) There may be no such marks or circumstances. Any case of finding will involve some combination of these circumstances. Any one has a perfect legal right to take possession of goods that have been lost, if he takes them for the purpose of holding them for the owner. If, therefore, a finder takes such goods with such intent, he is in lawful possession of the goods, whether or not there are any circumstances about the finding that indicate who is the owner. Therefore, since, as we have seen, one who is in lawful possession of goods cannot commit larceny by converting them to his own use, such finder is not guilty of larceny, though he should later, while the goods are in his possession, change his mind, and convert the goods found by him.[81]

Even though the finder, at the time he takes possession of the goods, takes them not with intent to return them to the true owner, but with intent to keep them for himself, he is not in all cases guilty of larceny. If at the time he takes possession with such fraudulent intent, there are no marks on the goods, or nothing in the circumstances under which they are found as reasonably to indicate to the finder who

[81] REG. v. THURBORN, 1 Denison, Cr. Cas. 387, 2 Car. & K. 831, Mikell Illus. Cas. Criminal Law, 169; Reg. v. Preston, 5 Cox, Cr. Cas. 390.

is the owner, no larceny is committed, even though on subsequently discovering the owner he refuses to return to him the goods.[83] If, on the other hand, the finder, at the time he takes possession of the goods, takes possession with the fraudulent intent to keep them for himself, he is guilty of larceny, if at that time he knows or has reasonable means of knowing or ascertaining who is the owner.[84]

When it is said that the finder is not guilty if at the time of taking possession he has no reasonable means of discovering who is the owner of the goods found, the phrase "time of taking possession" does not mean necessarily the instant he apprehends the goods. "The mere taking them up to look at them, would not be a taking possession of the chattels.[84] It is not necessary to the conviction of larceny of a finder of lost property that he should at the time of taking possession have known or have had reason to believe he

[83] REG. v. THURBORN, 1 Denison, Cr. Cas. 387, 2 Car. & K. 831, Mikell Illus. Cas. Criminal Law, 169.

[84] REG. v. THURBORN, 2 Car. & K. 831, 1 Denison, Cr. Cas. 387, Mikell Illus. Cas. Criminal Law, 169; Reg. v. York, 2 Car. & K. 841, 1 Denison, Cr. Cas. 335; 2 East, P. C. 663; 1 Hale, P. C. 506; Hunt's Case, 13 Grat. (Va.) 761, 70 Am. Dec. 443; Tanner v. Com., 14 Grat. (Va.) 635; Com. v. Titus, 116 Mass. 42, 17 Am. Rep. 138; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; State v. Ferguson, 2 McMul. (S. C.) 502; People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Tyler v. People, Breese (Ill.) 293, 12 Am. Dec. 176; People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; State v. Conway, 18 Mo. 321; Ransom v. State, 22 Conn. 153; State v. Boyd, 36 Minn. 538, 32 N. W. 780; McLaren v. State, 21 Tex. App. 513, 2 S. W. 858; People v. Seaton, 60 Hun, 570, 15 N. Y. Supp. 270; Perrin v. Com., 87 Va. 554, 13 S. E. 76; Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; Wolfington v. State, 53 Ind. 343. Obtaining possession under pretense of being the owner, State v. Farrow, 61 N. C. 161, 93 Am. Dec. 587; Quinn v. People, 123 Ill. 333, 15 N. E. 46.

[84] Parke, B., in REG. v. THURBORN, supra.

knew, the particular person who owned it, or have had the means of identifying him instanter.[85] On the other hand, such finder cannot be convicted solely because he might, with the exercise of diligence, have discovered the true owner." His belief, or grounds of belief, in regard to finding the owner, are not to be determined by the degree of diligence that he might be able to use to accomplish that purpose, but by the circumstances apparent to him at the time of finding the property.[86]

Same—Property Merely Mislaid

The law makes a distinction between property that is lost and property that is merely mislaid by the owner. The finder of property which he knows to be mislaid or left by mistake is guilty of larceny if he takes it with intent to appropriate it. If a passenger leaves property in a railroad car or a carriage, it is not lost, but merely mislaid; and if the carrier, or an employé of the carrier, or any other person, appropriates it to his own use, instead of turning it over to the proper person, to await the probable inquiry of the owner, he is guilty of larceny.[87] So, also, where a merchant or clerk, or even a stranger, appropriates property which a customer has left in a shop or store by mistake,[88] he commits larceny. Property found in a house by a servant or a stranger is not lost property; and if it belongs to

[85] Brooks v. State, 35 Ohio St. 46.

[86] White, J., in Brooks v. State, supra. See, also, People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; Lane v. People, 5 Gilman (10 Ill.) 305; Reg. v. Christopher, 8 Cox, Cr. Cas. 91.

[87] 2 East, P. C. 664; Reg. v. Pierce, 6 Cox, Cr. Cas. 117.

[88] Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644; Reg. v. West, Dears, Cr. Cas. 402; People v. McGarren, 17 Wend. (N. Y.) 460; Reg. v. Moore, 8 Cox, Cr. Cas. 416; State v. McCann, 19 Mo. 249.

the occupant of the house, and the finder appropriates it to his own use without inquiry, he is guilty of larceny.[89]

Same—Consent of Owner to Part with "Property" as Well as Possession

To constitute a trespass, it is not only essential that the thing shall be taken from the actual or constructive possession of the owner, but it must also be taken without his consent to pass the property.

We have already explained the effect of voluntarily parting with the possession, and have seen that, if a person lawfully obtains possession with the owner's consent, he cannot, while in lawful possession, commit larceny by appropriating the thing; but that, if he obtains possession fraudulently with intent to appropriate the thing to his own use, he commits larceny by subsequently carrying out his intention. In such case the appropriation is without the owner's consent. This is the law where the consent is to the change of possession only.[90]

The law, however, makes a distinction where the owner intends to part with "the property," or ownership, as well as the possession. Where the owner of goods delivers possession to the accused, intending to part absolutely with the ownership, there can be no larceny, whatever may be the intent of the taker; for, the owner having parted with the title to the goods to the accused, any conversion by the accused is not a conversion of the goods "of another." [91] The

[89] Reg. v. Kerr, 8 Car. & P. 176; Roberts v. State, 83 Ga. 369, 9 S. E. 675.

[90] Ante, p. 321.

[91] Atkinson's Case, 2 East, P. C. 673 (obtaining money as loan by false pretense); Rex v. Parkes, 2 Leach, 614; Kellogg v. State, 26 Ohio St. 15. Where defendant pretended to drop three shillings in a purse, and really dropped half pence, and thereby induced a man to give a shilling for the purse and contents, it was not larceny,

fact that the possession is obtained fraudulently, and with intent to appropriate the goods, is altogether immaterial. Thus, a person who, by false and fraudulent representations, induces another to give him a thing, or to sell and deliver goods on credit, does not commit larceny;[92] though, as will presently be seen, he may be guilty of cheating at common law, or of obtaining goods under false pretenses, in violation of statutes enacted partly to supply this defect in the common law.

It necessarily follows from what has been said that where possession of goods is obtained by fraud or trick from a servant or other agent of the owner, who delivers with intent to part with the ownership, and the servant has such authority, his act has the same effect as his master's, and there is no larceny; but it is otherwise if the servant or

since the man intended to part with the property. Reg. v. Solomons, 17 Cox, Cr. Cas. 93; People v. Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102. Parting with property to shield one's self from prosecution for crime, Haley v. State, 49 Ark. 147, 4 S. W. 746.

[92] Ross v. People, 5 Hill (N. Y.) 294; Rex v. Harvey, 1 Leach, 467; Rex v. Adams, 1, Denison, Cr. Cas. 38, Russ. & R. 225; Haley v. State, 49 Ark. 147, 4 S. W. 746; Com. v. Barry, 125 Mass. 390; Lewer v. Com., 15 Serg. & R. (Pa.) 93. Pledge delivered up in exchange for package falsely represented to contain diamonds, Rex v. Jackson, 1 Moody, Cr. Cas. 119. Borrowing money, and giving as security bag falsely represented to contain gold, Kellogg v. State, 26 Ohio St. 15. It is otherwise if the sale is on credit, the title to remain in the vendor until payment. People v. Raschke, 73 Cal. 378, 15 Pac. 13. One who obtains goods by pretending to be the purchasing agent of another to whom they are charged commits larceny, because the owner does not mean to invest him with the title. Harris v. State, 81 Ga. 758, 7 S. E. 689, 12 Am. St. Rep. 355. One who obtains money under a false pretense, with a promise to refund the money on a certain condition, is guilty of obtaining the money by false pretense, as the title to, not merely the possession of, the money passed, State v. Germain, 54 Or. 395, 103 Pac. 521.

agent has no authority to transfer the ownership, for in such case the goods are still the goods of another.[93]

There are apparent exceptions to the rule that there can be no larceny where the owner intends to part with the property. Thus, as we have seen,[94] if a merchant hands a customer goods which he has sold for cash, expecting to receive the money before the goods are taken away, and the customer, instead of paying, runs off with the goods, he commits larceny, notwithstanding the merchant may intend to part with the property.[95] So, also, if a customer, in paying for goods, hands the merchant more money than is due, expecting to receive change, and the merchant appropriates the entire amount, or if any person who receives money for which he is to give change appropriates it, and

[93] Com. v. Collins, 12 Allen (Mass.) 181; Rex v. Longstreeth, 1 Moody, Cr. Cas. 137; Reg. v. Hornby, 1 Car. & K. 305; Reg. v. Sheppard, 9 Car. & P. 121; Rex v. Jackson, 1 Moody, Cr. Cas. 119; Com. v. Cruikshank, 138 Pa. 194, 20 Atl. 937. Obtaining goods from clerk by falsely representing that owner has consented, Com. v. Wilde, 5 Gray (Mass.) 83, 66 Am. Dec. 350. Obtaining property from owner's minor son, People v. Camp, 56 Mich. 548, 23 N. W. 216. Where defendant induced a servant in care of a storehouse, and authorized to deliver only on the order of his master or C., to give him wheat, falsely representing he had been sent by C., it was larceny. Reg. v. Robins, Dears. Cr. Cas. 418. See, also, State v. McCartey, 17 Minn. 76 (Gil. 54). Where a forged order was presented at a bank, and the cashier paid it, it was not larceny, since the cashier had authority to pass the property. Reg. v. Prince, L. R. 1 Cr. Cas. 150.

[94] Ante, p. 327.

[95] Reg. v. Slowly, 12 Cox, Cr. Cas. 269; Reg. v. Cohen, 2 Denison, Cr. Cas. 249; Rex v. Campbell, 1 Moody, Cr. Cas. 179; Rex v. Gilbert, Id. 185; Rex v. Sharpless, 1 Leach, 92; Rex v. Pratt, 1 Moody, Cr. Cas. 250; Reg. v. Thompson, 32 Law J. M. Cas. 53; Blunt v. Com., 4 Leigh (Va.) 689, 26 Am. Dec. 341; State v. Hall, 76 Iowa, 85, 40 N. W. 107, 14 Am. St. Rep. 204. Giving worthless check on purchase, Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551. Contra,

refuses to give the change, he is guilty of larceny.[96] In most of these cases, however, the property is only parted with conditionally, if at all. Moreover, in most of these cases only the custody of the property is given, or the delivery is conditional, and the owner, even if he parts with the property, does not part with the possession unless the condition is fulfilled. The transfer of the property, like the delivery of possession, may be subject to a condition, and, if the condition is not performed, an appropriation of the goods is larceny, notwithstanding delivery of possession.[97]

A person does not consent to his property being taken merely by negligently or purposely leaving it exposed, or failing to resist the taking, even though he may know that another intends to come and steal it; but if he does consent to the taking, though only for the purpose of entrapping and prosecuting the intending thief, his consent will prevent the taking from being larceny; and it is immaterial in such case that the person taking the property does not know that the owner consents.[98]

where sale is on credit. Rex v. Harvey, 1 Leach, 467. And see ante, note 77.

[96] Reg. v. Bird, 12 Cox, Cr. Cas. 257; Walters v. State, 17 Tex. App. 226, 50 Am. Rep. 128; State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435; Com. v. Eichelberger, 119 Pa. 254, 13 Atl. 422, 4 Am. St. Rep. 642.

[97] Where a man deposited money with a pretended bookmaker at a race, who decamped, it was held larceny, since the owner did not intend to part with the property in the money except on condition that a bona fide bet was made. Reg. v. Buckmaster, 16 Cox, Cr. Cas. 339. Where a man bought a horse, and paid £8 on account, the balance to be paid on delivery, and the seller never intended to deliver the horse, it was held larceny, since the buyer did not intend to part with the property in the money except on condition of completion of the transaction. Reg. v. Russett [1892] 2 Q. B. 312.

[98] Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295; Rex v. Headge, 2 Leach, 1033; Reg. v. Lawrance, 4 Cox, Cr. Cas. 438; Pigg v. State, 43 Tex. 108; Conner v. State, 24

Same—Delivery by Mistake

Where the delivery of goods or money, though intentional, is by mistake, if the person receiving the goods or money takes them with knowledge, at the time, of the mistake, and with intent to appropriate, he commits larceny. These cases are to be distinguished from those where property is obtained by false pretenses, because in those cases the owner actually intends the property to pass, whereas when he delivers by mistake he has no such intention. The question is frequently presented where a person, intending to make a payment, by mistake pays more than the amount due. If the person receiving the money is aware of the mistake when he receives it, and then has a guilty intent or animus furandi, he is guilty of larceny.[99] On the other hand, as in the case of a finder, if the original taking is lawful, subsequent appropriation with knowledge is not enough. If the person to whom the money is paid does not

Tex. App. 245, 6 S. W. 138. Feigning drunken slumber, no consent, People v. Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238. See, for acts held not a consent, State v. Smith, 33 Nev. 438, 117 Pac. 19; State v. Abley, 109 Iowa, 61, 80 N. W. 225, 46 L. R. A. 862, 77 Am. St. Rep. 520; State v. Currie, 13 N. D. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. Rep. 687; State v. West, 157 Mo. 309, 57 S. W. 1071.

[99] Reg. v. Middleton, L. R. 2 Cr. Cas. 38; Wolfstein v. People, 6 Hun (N. Y.) 121. And see cases cited in next succeeding note. In Reg. v. Middleton, supra, the depositor in a post-office savings bank, in which 11 shillings stood to his credit, gave notice to withdraw 10 shillings. A warrant was issued, and a letter of advice sent to pay him 10 shillings. He handed in the warrant, and the clerk, who referred by mistake to another letter of advice for a larger sum, placed that sum on the counter, entered it in the depositor's book, and the depositor took it, having, as the jury found, animus furandi, and knowing the money to be the postmaster general's. It was held, by a majority of the court, to be larceny. See post, p. 341.

discover the mistake until afterwards, appropriation at that time is not larceny.[1]

The Caption or Taking and the Asportation or Carrying Away

To constitute larceny there must be both a taking of the property and a carrying of it away.[2] The taking is the securing of dominion or absolute control over the property; the carrying away is the removal of it from the place it formerly occupied. If the taker does not secure dominion over the property, there is no larceny, even though there is a carrying away by him. Thus it is not larceny to snatch a purse which is fastened by a chain to the owner's clothes, though the purse is removed the length of the chain, because the taker does not get complete dominion over it.[3] So, when the accused took an overcoat off a dummy, put it under his arm, and moved it two feet, but was prevented from carrying it further, because of a chain which attached it to the dummy, it was held not to be larceny.[4] So no

[1] Reg. v. Mucklow, 1 Moody, Cr. Cas. 160 (letter delivered to wrong person of same name); Reg. v. Flowers, 16 Cox, Cr. Cas. 33 (payment in excess of wages); Bailey v. State, 58 Ala. 414 (ten dollar bill given for dollar bill). REG. v. HEHIR, [1895] 2 Irish R. 709, Mikell Illus. Cas. Criminal Law, 174. In Reg. v. Ashwell, 16 Cox, Cr. Cas. 1, the Court for Crown Cases Reserved was equally divided in opinion on the guilt of the prisoner on a similar state of facts. Contra: State v. Ducker, 8 Or. 394, 34 Am. Rep. 590. And see Wolfstein v. People, supra.

[2] The necessity for asportation has been abolished by statute in some states. See Dale v. State, 32 Tex. Cr. R. 78, 22 S. W. 49; Doss v. State, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618; Wampler v. State, 28 Tex. App. 352, 13 S. W. 144.

[3] Wilkinson's Case, 2 East, P. C. 556. The reason given by East is that there was no carrying away of the purse; but this is clearly erroneous.

[4] People v. Meyer, 75 Cal. 383, 17 Pac. 431; Clark v. State, 59 Tex. Cr. R. 246, 128 S. W. 131, 29 L. R. A. (N. S.) 323.

larceny is committed where an animal is enticed along by an intending thief, but no control is secured of it.[5]

As has been said the asportation or carrying away is the removal of the property from the place it occupied at the time of the taking. Any removal, however slight, is sufficient to constitute this element of larceny.[6] It has been held a sufficient asportation where a bag was merely lifted from the space it occupied, and immediately dropped on detection,[7] and where a sword was partly lifted out of its scabbard.[8] So, also, there is a sufficient removal to constitute larceny where property is lifted from a person's pocket, or from a drawer, though, before it is entirely removed from the pocket or drawer, the thief is detected, and drops it.[9] In all of these cases the property was entirely removed from the place it occupied, though the removal was slight, and the thief acquired absolute control. The removal, however, to be sufficient, must be such that every portion of the property occupy a different place from that occupied by

[5] Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67.

[6] Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; Gettinger v. State, 13 Neb. 308, 14 N. W. 403; State v. Higgins, 88 Mo. 354. Taking wheat from granary, and putting it into sacks, State v. Hecox, 83 Mo. 531. Removing grain from the owner's garner, in a mill into the garner of the accused, adjoining it, State v. Craige, 89 N. C. 475, 45 Am. Rep. 698. Taking sheets from bed, and carrying them into the hall, 3 Inst. 108; 1 Hale, P. C. 507, 508. Removing bag from one end of a wagon to the other, Coslet's Case, 1 Leach, 236. Snatching an earring from a lady's ear, but dropping it in her hair, Lapier's Case, 1 Leach, 320. Removing money drawer from a safe to the floor, State v. Green, 81 N. C. 560.

[7] Rex v. Walsh, 1 Moody, Cr. Cas. 14.

[8] 2 Russ. Crimes, 153.

[9] Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; Com. v. Luckis, 99 Mass. 431, 96 Am. Dec. 769; Eckels v. State, 20 Ohio St. 508; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; Files v. State, 36 Tex. Cr. R. 206, 36 S. W. 93; Rex v. Thompson, 1 Moody, Cr. Cas. 78; Reg. v. Simpson, 6 Cox, Cr. Cas. 422.

it before the taking. Thus, the asportation has been held insufficient where a bale was merely set up on end, and cut open, but nothing taken out of it.[10] Merely to kill or trap an animal, without carrying it away, has frequently been held not to be a sufficient asportation to constitute larceny,[11] but it is otherwise if, after the animal is killed, it is removed to another place.[12] If there has been the necessary caption and asportation, the immediate dropping or return of the article is immaterial.[13] The asportation need not be by hand nor by the use of any personal force. An animal may be stolen by being enticed away by food.[14] Tapping a pipe, and taking gas or water therefrom, may be larceny.[15] It has also been held larceny to obtain property from a slot machine by dropping into the slot a piece of metal other than money.[16] The asportation may be ef-

[10] Cherry's Case, 2 East, P. C. 556. In State v. Jones, 65 N. C. 395, the accused turned a barrel of turpentine from its head over on its side. This was held, on the authority of Cherry's Case, supra, not to be an asportation.

[11] State v. Seagler, 1 Rich. (S. C.) 30, 42 Am. Dec. 404; Ward v. State, 48 Ala. 161, 17 Am. Rep. 31; State v. Wisdom, 8 Port. (Ala.) 511; People v. Murphy, 47 Cal. 103; Wolf v. State, 41 Ala. 412; Williams v. State, 63 Miss. 58. Shooting and wounding animal, Minter v. State, 26 Tex. App. 217, 9 S. W. 561; Molton v. State, 105 Ala. 18, 16 South. 795, 53 Am. St. Rep. 97.

[12] 2 East, P. C. 617; State v. Alexander, 74 N. C. 232; Lundy v. State, 60 Ga. 143; Rex v. Hogan, 1 Craw. & D. 366; Rex v. Clay, Russ. & R. 387.

[13] Simon's Case, Kel. J. 31; Georgia v. Kepford, 45 Iowa, 48; Eckels v. State, 20 Ohio St. 508. Abandoning horse after taking it, State v. Davis, 38 N. J. Law, 176, 20 Am. Rep. 367.

[14] State v. Wisdom, 8 Port. (Ala.) 511; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67; State v. Whyte, 2 Nott & McC. (S. C.) 174.

[15] Reg. v. White, 6 Cox, Cr. Cas. 213, 3 Car. & K. 363; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706; State v. Wellman, 34 Minn. 221, 25 N. W. 395.

[16] Reg. v. Hands, 16 Cox, Cr. Cas. 188.

fected by means of an innocent human agency.[17] Where a person fraudulently points out another's property as his own, and sells it, and the purchaser takes it away, this is held a taking and carrying away by the seller.[18] We have already seen that a person who procures an innocent third person, a child, for instance, to steal property for him, is

[17] Where, at a railway station, defendant changed the checks upon his own and complainant's trunks, which had been previously checked, thereby causing complainant's trunk to be carried out of the state to the destination designated by the changed check, where defendant received it, he was guilty of larceny. Lord, J., said: "As soon as the trunk was placed on board the cars, checked, with the corresponding check in the possession of the defendant, * * * the trunk and its contents were in the possession and control of the defendant. * * * Nor is the time when the actual manual possession came into the hands of the parties important, they having all the time the constructive possession, and the real control of it." Com. v. Barry, 125 Mass. 390. Causing hostler at inn to lead out horse. Rex v. Pitman, 2 Car. & P. 423.

[18] Cummings v. Com., 5 Ky. Law Rep. 200; Dale v. State, 32 Tex. Cr. R. 78, 22 S. W. 49; Doss v. State, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618. And see Wampler v. State, 28 Tex. App. 352, 13 S. W. 144. But see, People v. Gillis, 6 Utah, 84, 21 Pac. 404. In the case last cited, defendant sold a poundkeeper a hog in the pound, which defendant pointed out as his. The keeper turned the hog out on the range. Held, as defendant had never had dominion over the animal, there was no caption. In Henderson v. State, 79 Ark. 333, 96 S. W. 359, 10 L. R. A. (N. S.) 816, Henderson sold lumber to A. The lumber was left on Henderson's premises. He then sold it to B., who moved it away in the absence of Henderson. Held, Henderson was not guilty of larceny, since he was absent when the lumber was carried away and did not authorize the asportation of it by B. Where one sells an article to which he has no title, and which is not in his possession, and the innocent purchaser removes the property, the seller is guilty of larceny; but, where the purchaser knows the seller had no title, removal by him is not asportation by the seller. Smith v. State (Ga. App.) 83 S. E. 437. If A. takes property from B., knowing it is B.'s, he is not excused, on an indictment for larceny, by proving that he purchased it from X., who he knew had no right to sell it. Jameson v. State, 32 Tex. Cr. R. 385, 24 S. W. 508.

himself guilty of the larceny, as a principal in the first degree.[19]

The Intent

In addition to the taking and removal of the thing by trespass, there must be an intent to deprive the owner permanently of his property therein, and the intent must exist at the time of the taking. This is absolutely essential.[20] To take another's property for temporary use, without his consent, as, for instance, to take another's horse from his stable to ride a short distance, and then return it, would be a trespass, but not larceny.[21] It is said that it is not necessary that the intent be to deprive the owner permanently of the whole property; it is sufficient if the taker intend to

[19] Ante, p. 110.

[20] Reg. v. Holloway, 3 Cox, Cr. Cas. 241, 2 Car. & K. 942; Rex v. Dickinson, Russ. & R. 420; State v. Ledford, 67 N. C. 60; Cain v. State, 21 Tex. App. 662, 2 S. W. 888; Johnson v. State, 36 Tex. 375; Bryant v. State, 25 Tex. App. 751, 8 S. W. 937; Mead v. State, 25 Neb. 444, 41 N. W. 277; Ross v. Com. (Ky.) 20 S. W. 214; Phelps v. People, 55 Ill. 334. Where a workman in a tannery was paid according to the number of skins he dressed, and took dressed skins and handed them in in order to be paid as if he had dressed them, it was not larceny of the skins, because he did not intend to deprive the owner of them. Reg. v. Holloway, supra. Contra, Fort v. State, 82 Ala. 50, 2 South. 477. Taking property without felonious intent, and negligently losing it, is not larceny. Billard v. State, 30 Tex. 367, 94 Am. Dec. 317. Taking property of drunken man, discarded by him, in order to preserve it for him, not larceny. State v. Gilmer, 97 N. C. 429, 1 S. E. 491. Taking property by mistake not larceny. Donahoe v. State, 23 Tex. App. 457, 5 S. W. 245; White v. State, 23 Tex. App. 643, 5 S. W. 164; Criswell v. State, 24 Tex. App. 606, 7 S. W. 337. One who sells a borrowed horse, and takes it from the buyer, intending to return it to the lender, does not commit larceny from the buyer. Gooch v. State, 60 Ark. 5, 28 S. W. 510. See, also, ante, p. 306.

[21] Schultz v. State, 30 Tex. App. 94, 16 S. W. 756; State v. South, 28 N. J. Law, 28, 75 Am. Dec. 250; Rex v. Phillips, 2 East, P. C.

deprive him of the entire ownership of any part of it. Thus, it is larceny to take another's property with intent to sell it back to him,[22] or to return it only on payment of a reward,[23] or to force a sale of it to the taker at a price less than its value.[24] To take a railroad ticket to use has been held to be larceny, though the use of it would bring it back into the possession of the owner.[25] It has also been held to be larceny to take goods for the purpose of pawning them, even though the taker intended to redeem them.[26]

662; Rex v. Crump, 1 Car. & P. 658; State v. York, 5 Har. (Del.) 493; Reg. v. Addis, 1 Cox, Cr. Cas. 78; Umphrey v. State, 63 Ind. 223. In Rex v. Phillips, supra, the defendant took the horse of the prosecutor and rode it to L., where he left it at an inn saying he would return for it. He did not return, and the jury found that he had no intention to return for it, or to make any further use of it. It was held not to be larceny, as there was "no intention in the prisoner to change the property or make it his own, but only to use for a special purpose; i. e., to save his labor in travelling." In State v. Ward, 19 Nev. 297, 10 Pac. 133, the prisoner took a horse, rode it twelve miles, and turned it loose. It was held that defendant could not be convicted, unless he intended to deprive the owner permanently of his property, but that the jury might find such intention from the taking, abandonment, reckless exposure to loss, and other facts in the case.

[22] Reg. v. Hall, 1 Denison, Cr. Cas. 381, 2 Car. & K. 947. In this case a clerk secretly removed a quantity of fat from one room in a store to another, and placed it on the scales, representing that a customer had brought it to sell.

[23] Reg. v. O'Donnell, 7 Cox, Cr. Cas. 337; Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506.

[24] Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

[25] Reg. v. Beecham, 5 Cox, Cr. Cas. 181.

[26] Reg. v. Phetheon, 9 Car. & P. 552; Reg. v. Medland, 5 Cox, Cr. Cas. 292; Reg. v. Tribilcock, 7 Cox, Cr. Cas. 408. Contra, Rex v. Wright, 9 Car. & P. 554, note. In Reg. v. Medland, supra, the court said it was not sufficient to excuse that accused had the intent to redeem; he must also show that he had the ability to do so. A trustee, misappropriating a check which belongs to the trust, is guilty of statutory larceny, although he intended to repay the money, and

So, also, where a person has the legal possession of property, as bailee or otherwise, the owner may commit larceny by taking it from him, with intent to charge him with its value.[27] The existence of the intent in larceny must in many cases be inferred from the circumstances. Thus, if a person secretly takes property, hides it, and denies that he knows anything about it, the intent to appropriate it to his own use may well be inferred; but if he takes it openly, and returns it, this would tend to show an innocent purpose.[28] Where the necessary intent exists at the time the property is taken, returning the property afterwards or abandoning it does not remove the guilt of the thief,[29] though there are statutes in some states making the punishment less severe on reparation being voluntarily made.[30]

Same—Claim of Right

Since the taking must be with felonious intent, or with intent to deprive the owner of his property in the thing

the money was in fact repaid before indictment. People v. Shears, 158 App. Div. 577, 143 N. Y. Supp. 861.

[27] 3 Inst. 110; 1 Hale, P. C. 513; 2 East, P. C. 659; Palmer v. People, 10 Wend. (N. Y.) 166, 25 Am. Dec. 551; People v. Thompson, 34 Cal. 671; Com. v. Greene, 111 Mass. 392; People v. Wiley, 3 Hill (N. Y.) 194. Ante, p. 315.

[28] 2 Russ. Crimes, 158; Robinson v. State, 113 Ind. 510, 16 N. E. 184; Booth v. Com., 4 Grat. (Va.) 525; Black v. State, 83 Ala. 81, 3 South. 814, 3 Am. St. Rep. 691. Where conversion follows hard upon receipt, intent at the time of receipt may be inferred. Com. v. Rubin, 165 Mass. 453, 43 N. E. 200.

[29] 2 East, P. C. 557; State v. Scott, 64 N. C. 586; Georgia v. Kepford, 45 Iowa, 48; Eckels v. State, 20 Ohio St. 508; State v. Davis, 38 N. J. Law, 176, 20 Am. Rep. 367; Stepp v. State, 31 Tex. Cr. R. 349, 20 S. W. 753. See, also, ante, p. 339, note 13. Of course, it is otherwise if the property is abandoned before there has been a sufficient asportation to constitute larceny. Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67.

[30] Anderson v. State, 25 Tex. App. 593, 9 S. W. 43; Guest v. State,

taken, taking under a bona fide claim of right, however unfounded, is not larceny.[81] And, as we have seen,[82] although ignorance of the law is, as a rule, no excuse, it is an excuse if it negatives the existence of a specific intent. Therefore, even if the taker's claim of right is based upon ignorance or mistake of law, it is sufficient to negative a felonious intent.[83] A fortiori, a mistake of fact, if it is the basis of a bona fide claim of right, is sufficient. A mere custom to take goods without right, however, is not a sufficient basis for a claim of right.[84] Since the specific intent to deprive

24 Tex. App. 530, 7 S. W. 242; Boze v. State, 31 Tex. Cr. R. 347, 20 S. W. 752.

[81] Hall v. State, 34 Ga. 208; State v. Holmes, 17 Mo. 379, 57 Am. Dec. 269; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; Severance v. Carr, 43 N. H. 65; People v. Carabin, 14 Cal. 438; State v. Fisher, 70 N. C. 78; Owens v. State, 21 Tex. App. 579, 2 S. W. 808; Causey v. State, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447; Buchanan v. State (Miss.) 5 South. 617; McGowan v. State, 27 Tex. App. 183, 11 S. W. 112; People v. Devine, 95 Cal. 227, 30 Pac. 378. Peaceably, and under advice of counsel, taking property from purchaser at execution sale. People v. Schultz, 71 Mich. 315, 38 N. W. 868. Cf. People v. Long, 50 Mich. 249, 15 N. W. 105. Creditor taking goods of debtor guilty of larceny. Gettinger v. State, 13 Neb. 308, 14 N. W. 403. Taking as agent on claim of ownership by principal. People v. Slayton, 123 Mich. 397, 82 N. W. 205, 81 Am. St. Rep. 211. If an officer of a company takes money from the company with intent to use it for his own purposes, he is guilty of larceny, although the company was indebted to him in a sum equal to that taken, if the sum taken was not taken with a bona fide intent to cancel the debt. People v. Barnes, 158 App. Div. 712, 143 N. Y. Supp. 885.

[82] Ante, p. 89.

[83] Rex v. Hall, 3 Car. & P. 409; Reg. v. Reed, Car. & M. 306; Com. v. Stebbins, 8 Gray (Mass.) 492. See, also, cases cited in note 82, supra, ante, p. 89.

[84] Com. v. Doane, 1 Cush. (Mass.) 5 (custom to take fruit from vessel in transit); Hendry v. State, 39 Fla. 235, 22 South. 647. See Bolln v. State, 51 Neb. 581, 71 N. W. 444.

the owner of his property is necessary. drunkenness, if so great as to negative this intent, is a good defense.[35]

Same—Lucri Causa

As to whether the taking must be lucri causa, that is, whether the thief must expect to reap some benefit, not necessarily pecuniary, to himself, the authorities are conflicting.[36] On principle, "if," as Mr. Bishop says, "we may resort to it while dealing with a branch of the law so very technical," [37] the taking need not be for the advantage of the thief, and the motive is immaterial if the intent is to deprive the owner permanently of his property. This view appears to have prevailed in England.[38] The decisions in the different states are conflicting.[39] Those courts which

[35] See 1 Bish. New Cr. Law (8th Ed.) § 411.

[36] See 1 Whart. Cr. Law, § 895 et seq.

[37] 2 Bish. New Cr. Law, § 842 et seq.

[38] Defendant was convicted of larceny of a horse, which he had taken from its stable and killed, in order to protect a man in custody for having previously stolen the horse. It was objected that the taking was not animo furandi et lucri causa. Six of the judges held it not essential that the taking be lucri causa, but that taking fraudulently with intent to deprive the owner wholly of the property was sufficient; but some of the six thought the object of protecting the man in custody might be deemed a benefit, or lucri causa. Five judges thought the conviction wrong. Rex v. Cabbage, Russ. & R. 202. Where it was the duty of a servant to split beans doled out to him, and feed them to his master's horses, and he took two bushels after receiving the daily allowance, intending to give them to the horses, eight out of eleven judges held it larceny, though some thought that the diminishing of the work in looking after the horses made the taking lucri causa. Rex v. Morfit, Russ. & R. 307. See, also, Reg. v. Privett, 1 Denison, Cr. Cas. 193. In the case last cited a servant, a carter, took oats from one part of a barn and secreted them in another part for the sole purpose of giving them to his master's horses. A majority of the judges held that this constituted larceny of the oats, though the servant had nothing to gain from the taking.

[39] In the following cases a taking lucri causa was held essential:

hold a taking lucri causa necessary regard a destruction of property merely for the purpose of destroying it to be malicious mischief only. By "lucri causa" is not meant pecuniary advantage.[40] Any benefit is sufficient. Thus, it has been held enough where a woman burned a letter to prevent harm to herself from the contents.[41]

Same—Coexistence of Act and Intent

Not only must this felonious intent or animus furandi exist, but it must exist at the time the property is taken.[42]

Respublica v. Teischer, 1 Dall. (Pa.) 335, 1 L. Ed. 163; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; State v. Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294 (repudiated in Williams v. State, 52 Ala. 413); State v. Brown, 3 Strob. (S. C.) 508; U. S. v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009; Pence v. State, 110 Ind. 95, 10 N. E. 919. In the following cases it was held unnecessary: Hamilton v. State, 35 Miss. 214; Keely v. State, 14 Ind. 36; Williams v. State, 52 Ala. 411; State v. Davis, 38 N. J. Law, 176, 20 Am. Rep. 367; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; State v. Mills, 12 Nev. 403; State v. Slingerland, 19 Nev. 135, 7 Pac. 280; People v. Juarez, 28 Cal. 380; Delk v. State, 64 Miss. 77, 1 South. 9, 60 Am. Rep. 46; Warden v. State, 60 Miss. 640; State v. Caddle, 35 W. Va. 73, 12 S. E. 1098; State v. Wellman, 34 Minn. 221, 25 N. W. 395; Best v. State, 155 Ind. 46, 57 N. E. 534; Canton Nat. Bank v. American Bonding & Trust Co., 111 Md. 41, 73 Atl. 684, 18 Ann. Cas. 820; People ex rel. Perkins v. Moss, 187 N. Y. 410, at pages 419, 438, 80 N. E. 383, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309.

[40] Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670.

[41] Reg. v. Jones, 2 Car. & K. 236, 1 Denison, Cr. Cas. 188. See, also, Reg. v. Wynn, 3 Cox, Cr. Cas. 271.

[42] People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; Roberts v. State, 21 Tex. App. 460, 1 S. W. 452; State v. Shermer, 55 Mo. 83; People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; Morrison v. State, 17 Tex. App. 34, 50 Am. Rep. 120; State v. Hayes, 111 N. C. 727, 16 S. E. 410; Wilson v. People, 39 N. Y. 459; Guest v. State, 24 Tex. App. 235, 5 S. W. 840; Nichols v. State, 28 Tex. App. 105, 12 S. W. 500; People v. Morino, 85 Cal. 515, 24 Pac. 894; Hill v. State, 57 Wis. 377, 15 N. W. 445. Snatching money from another in fun with his

As before stated, to acquire possession of property lawfully, and afterwards form and carry out an intention to appropriate it, is not larceny; as, for instance, where possession of property is lawfully obtained by a bailee, and he subsequently determines to appropriate it.[43] Nor is it larceny to withhold and refuse to give up another's property if it was not taken with felonious intent.[44] We have already said something about excessive payments made by mistake,[45] and the finding of lost property,[46] but it will be well to consider the questions further in connection with the question of intent. It was stated that where more money than is due a man is paid him by mistake, and he appropriates it all to his own use, he is guilty of larceny if he knew of the mistake when he received it, but not if he was innocent then, and afterwards discovered the mistake, and fraudulently kept the excess. The weight of authority is in favor of this doctrine, on the ground that the fraudulent intent must exist at the time of the taking;[47] but there is at least one case which holds him guilty, whether he knew of the mistake when he received the money or not, on the ground that, to prevent the taking from being a trespass which, in connection with the

knowledge; subsequent appropriation not larceny. Graves v. State, 25 Tex. App. 333, 8 S. W. 471.

[43] Ante, p. 321.

[44] Reg. v. Gardner, 9 Cox, Cr. Cas. 253; Rex v. Banks, Russ. & R. 441.

[45] Ante, p. 336.

[46] Ante, p. 328.

[47] People v. Miller, 4 Utah, 410, 11 Pac. 514; Reg. v. Middleton, 12 Cox, Cr. Cas. 260, 417; Reg. v. Flowers, 16 Cox, Cr. Cas. 33; Reg. v. Ashwell, 16 Cox, Cr. Cas. 1. Taking a coat containing, unknown to the taker, a watch, and afterwards appropriating the watch on discovering it, is a stealing of the watch also. Stevens v. State, 19 Neb. 647, 28 N. W. 304.

subsequently formed and executed felonious intent, will make the taking larceny, the consent of the owner to part with his property must be as broad as the taking, and, as the owner did not consent to part with the excess, the taking, as to it, was a trespass.[48] As to the finding of lost property, it is universally held that if the finder does not know the owner at the time he finds it, and the circumstances are not such as to reasonably point out the owner, no subsequent fraudulent dealing with the property, even after he knows who the owner is, can make him guilty of larceny. If the original possession is innocent, a subsequent change of mind and fraudulent appropriation do not make him guilty.[49]

Same—Continuing Trespass

There is an apparent exception to the rule that the intent to steal must exist at the time of taking, where the original taking, although not felonious, involves a trespass, even a mere civil trespass. In such case the trespass is deemed to continue, and a subsequent asportation is a renewal of the trespass, and, when accompanied with intent to steal, is larceny.[50] Thus, where the defendant, who had pastured his lambs with the prosecutor's, drove them off, and with them by mistake one of the latter's, and on perceiving the fact he appropriated the lamb, it was held lar-

[48] State v. Ducker, 8 Or. 394, 34 Am. Rep. 590.

[49] People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Reg. v. Preston, 5 Cox, Cr. Cas. 390; State v. Roper, 14 N. C. 473, 24 Am. Dec. 268; Ransom v. State, 22 Conn. 153; State v. Conway, 18 Mo. 321; Mayes v. State (Tenn.) 4 S. W. 659; Gregg v. State, 64 Ind. 223; Starck v. State, 63 Ind. 285, 30 Am. Rep. 214.

[50] Reg. v. Riley, 6 Cox, Cr. Cas. 88; COM. v. WHITE, 11 Cush. (Mass.) 483, Mikell Illus. Cas. Criminal Law, 182; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610. See 2 Bish. New Cr. Law, § 839.

ceny.[51] So, where the defendant obtained a horse by pretending he wanted to go to a certain place and for a certain time, and meant to go farther and longer, but not to steal the horse, and afterwards converted it, it was held that he was guilty of larceny, since he was a trespasser from the beginning, and the trespass was continuous, and, when to the trespass was added a felonious intent, the larceny became complete from that moment.[52]

Simple and Compound Larceny

At common law, compound larcenies are known by other names, and are treated as distinct crimes. Thus, to assault a person, and steal from his person, is a compound larceny, but it is known as robbery.[53] Statutes, however, both in England and in the United States, have created a number of compound larcenies, which are known and treated as such, and which are punished more severely than simple larceny. Thus, to steal from the person of another is a statutory compound larceny.[54] The original English stat-

[51] Reg. v. Riley, supra.

[52] State v. Coombs, supra. As to the continuing trespass, where goods stolen without are brought within the jurisdiction, post, p. 489; also, Reg. v. Wynn, 3 Cox, Cr. Cas. 271.

[53] Post, p. 373.

[54] Must be taken without owner's knowledge. Moye v. State, 65 Ga. 754. Contra, Com. v. Dimond, 3 Cush. (Mass.) 235. Suddenness of taking, and knowledge by owner, Green v. State, 28 Tex. App. 493, 13 S. W. 784; Brown v. State (Tex. Cr. App.) 22 S. W. 24. It is immaterial that person from whom the property was stolen was asleep. Hall v. People, 39 Mich. 717. Taking key from pocket of person asleep in bed, opening trunk, and taking property therefrom, is not a stealing from the person, but from the house, as the property is under the protection of the house, and not of the person. Com. v. Smith, 111 Mass. 429. Receiver of stolen goods not guilty of larceny from the person. People v. Sligh, 48 Mich. 54, 11 N. W. 782. The doctrine as to asportation is the same as in case of simple larceny. Dukes v. State, 22 Tex. App. 192, 2 S. W. 590. Drawing

ute defined it substantially as the felonious taking of any money, goods, or chattels from the person of another, "privily," without his knowledge.[55] The statutes in the different states vary somewhat, but they are all substantially based on this old English statute. Other statutory compound larcenies are stealing from a dwelling house,[56] from a store or shop [57] or warehouse,[58] or any house or building,[59] and from a vessel. In some of the states lar-

pocketbook partly from pocket held larceny from person. Flynn v. State, 42 Tex. 301.

[55] 8 Eliz. c. 4, § 2.

[56] Underground cellar, not communicating with upper stories, and used for storage, not a "dwelling house." State v. Clark, 89 Mo. 423, 1 S. W. 332. Stealing watch hanging on post covered by roof of building is larceny from the building. Burge v. State, 62 Ga. 170. Furnished room in basement of office building, used as bedroom, is a "dwelling." People v. Horrigan, 68 Mich. 491, 36 N. W. 236. Theft from tent not a theft from dwelling house. Callahan v. State, 41 Tex. 43. Hotel kept by another than owner is dwelling house of keeper. State v. Leedy, 95 Mo. 76, 8 S. W. 245. Stealing property of A. from dwelling house of B. is a larceny from the dwelling house. Hill v. State, 41 Tex. 157. Taking key from pocket of person asleep in bed, and stealing from a trunk, is larceny from the dwelling house, and not from the person. Com. v. Smith, 111 Mass. 429; Rex v. Taylor, Russ. & R. 418. Larceny from dwelling house may be committed by invited guest, as the aggravation of the offense is the violation of the sanctity of the dwelling house. Point v. State, 37 Ala. 148. But it has been held that a servant, having the right of entry, cannot be guilty of stealing from master's dwelling house, but commits simple larceny only. Taylor v. State, 42 Tex. 388; Wakefield v. State, 41 Tex. 556. But see, contra, Wall v. State, 75 Ga. 474.

[57] Taking property from door of store, People v. Wilson, 55 Mich. 507, 21 N. W. 905.

[58] Trunk on covered platform of depot not in warehouse, Lynch v. State, 89 Ala. 18, 7 South. 829.

[59] Stealing from ginhouse outside the curtilage is stealing from house. It need not be a dwelling house. Stanley v. State, 58 Ga. 430. Servant stealing cotton from ginhouse is guilty of larceny from house. Wall v. State, 75 Ga. 474. Where a person went to a bank,

ceny is divided into degrees, and by some it is made to include embezzlement, obtaining property by false pretenses, and almost all other frauds of like character.

EMBEZZLEMENT

99. Embezzlement is not a crime at common law, but is made so by statute, to punish the fraudulent appropriation of property by one lawfully in possession before it has been in the possession of the owner, or by one who has lawfully obtained possession from the owner, and who in neither case is guilty of larceny, because there is no taking from the owner's possession by an act of trespass.

100. There are differences in the statutes of the various states, but the crime may be defined generally as the unlawful appropriation of property to his own use by a servant, clerk, trustee, public officer, or other person, to whom the possession has been intrusted by or for the owner.

In larceny, as has been seen, the property must be taken from the actual or constructive possession of the owner, and that crime cannot be committed by one who lawfully

laid his satchel on a shelf, and, while a confederate distracted his attention, the accused stole from the satchel, it was held a larceny from the house. Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885. Where a person in whose hands goods are placed in a store to examine, with a view to purchase them, runs off with them while the proprietor's back is turned, he does not steal from the building, but is guilty of simple larceny only; as, to constitute larceny from the building, the property must be under the protection of the building, and not under the eye of some one in the building. Com. v. Lester, 129 Mass. 101.

acquires possession of property for another in the course of business, and appropriates it before the latter comes into possession. Such is the case where money is paid by a third person to a clerk on his employer's account, and the clerk appropriates it before it has been put in the money drawer or otherwise come into his employer's possession. At common law, to constitute larceny, it is also necessary that the property be taken from the owner's possession by trespass, with intent to deprive him of his ownership; and therefore that crime is not committed by a bailee or other person who, after lawfully obtaining possession from the owner in good faith, appropriates it to his own use. It was to meet these cases that the embezzlement statutes were enacted. There is no such crime at common law.

The original English statute[60] was enacted in consequence of a decision that a banker's clerk who received money from a customer, and appropriated it to his own use, could not be convicted of larceny, on the ground that the money had never been in the employer's possession.[61] The

[60] 39 Geo. III, c. 85. This statute, which has been the model of the American statutes, is as follows: "If any servant or clerk, or any person employed for the purpose in the capacity of servant or clerk, to any person or persons whomsoever, or to any body corporate or politic, shall by virtue of such employment receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for, in the name or on account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers for whose use or in whose name or names, or on whose account the same was or were delivered to or taken into the possession of such servant, clerk or other person so employed, although such money, goods, bond, bill, note, banker's draft, or other valuable security was or were not otherwise received into the possession of his or their servant, clerk or other person so employed. * * *"

[61] Rex v. Bazeley, 2 East, P. C. 571.

English statutes and the statutes of the different states vary, and it is therefore impossible, in the limited space which the purpose of this book allows, to do more than give this general explanation of the crime. The statutes must be consulted. Mr. Wharton states that these statutes were not intended to overlap the common law, but to provide for those cases which it could not reach, and that larceny at common law cannot be embezzlement under the statute, and there are many cases to the same effect.[62] Mr. Bishop and some courts take the contrary view.[63]

The statutes generally are directed at servants, clerks, and agents who appropriate to their own use property which they have received for their master or principal, or at bailees or other trustees who appropriate the property which they have bona fide received.[64] Since these statutes are penal, they are strictly construed. A servant is one who is employed in the service of another; who is under the immediate control of his master, and who is to carry out his master's orders under his implicit directions and usually with no option as to how or when the work is to be done.[65] Thus, one who solicits orders for another, having the right

[62] 1 Whart. Cr. Law, §§ 1009, 1027–1029, 1050; Rex v. Headge, Russ. & R. 160; Rex v. Sullens, 1 Moody, Cr. Cas. 129; Quinn v. People, 123 Ill. 337, 15 N. E. 46; Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767; Com. v. O'Malley, 97 Mass. 584; Com. v. Davis, 104 Mass. 548; State v. Sias, 17 N. H. 558; Lowenthal v. State, 32 Ala. 589; People v. Perini, 94 Cal. 573, 29 Pac. 1027; People v. Johnson, 91 Cal. 265, 27 Pac. 663; Cody v. State, 31 Tex. Cr. R. 183, 20 S. W. 398.

[63] 2 Bish. New Cr. Law, §§ 328, 329. And see People v. Dalton, 15 Wend. (N. Y.) 581; State v. Taberner, 14 R. I. 272, 51 Am. Rep. 382; Lowenthal v. State, 32 Ala. 589.

[64] In some states there are separate statutes dealing with larceny by an ordinary bailee. See P. & L. Dig. of Laws of Pa. tit. Crimes, § 203.

[65] 10 Am. & Eng. Enc. Law (2d Ed.) 997, 998.

to take or reject orders as he sees fit, being paid by commission, is not a "servant" under the statute, or even a "clerk," [66] as he is not under the control of his employer; nor is a person who carries on the business of a debt collector and who is employed to collect certain specified debts, the time and method of collecting being left to his discretion, he to be paid by commission.[67] But a person employed as a traveler to solicit orders under the full control, as to his time and services, of his employer, is a "servant" within the meaning of the statute.[68] The term "servant" includes apprentices,[69] domestics,[70] treasurers,[71] tax collectors,[72] stage drivers,[73] barge captains,[74] and other persons under the immediate control of their employers.

A clerk is a person in the employ of a merchant, who attends to a part of the merchant's business, while the merchant himself superintends the whole; [75] while an agent is one employed in the service of another, who not only does for that other, but represents him, and acts for him in his name and stead.[76] To be an agent one must act for an-

[66] Reg. v. Bowers, L. R. 1 C. C. 41; Reg. v. Marshall, 11 Cox, Cr. Cas. 490. "It seems to me that the distinction between the relations of master and servant and principal and agent is this: A principal has a right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." Bramwell, B., in Reg. v. Walker, 2 Dears. & B. Cr. Cas. 600.

[67] Reg. v. Hall, 13 Cox, Cr. Cas. 49.

[68] Reg. v. Turner, 11 Cox, Cr. Cas. 551.

[69] Rex v. Mellish, Russ. & Ry. 80.

[70] Rex v. Smith, Russ. & Ry. 267.

[71] Rex v. Squire, Russ. & Ry. 349; Com. v. Tuckerman, 10 Gray (76 Mass.) 173.

[72] Reg. v. Adey, 1 Denison, Cr. Cas. 571.

[73] Reg. v. White, 8 Car. & P. 742; People v. Sherman, 10 Wend. (N. Y.) 299, 25 Am. Dec. 563.

[74] Rex v. Hartley, Russ. & Ry. 139.

[75] 10 Am. & Eng. Enc. Law (2d Ed.) 999.

[76] 10 Am. & Eng. Enc. Law (2d Ed.) 998.

other, not for himself; therefore a bailee, who receives property for his own use or behoof, is not an agent within the statute,[77] nor is one who receives materials to work on on his own premises.[78] To be a servant, clerk, or agent it is not necessary that he be formally appointed as such; if he receives the property as such, it is sufficient,[79] nor is it essential that he be paid for his services.[80] The employment, by the better opinion, need be only for the particular transaction.[81]

[77] Pullam v. State, 78 Ala. 32, 56 Am. Rep. 21.

[78] Com. v. Young, 9 Gray (Mass.) 5. Who are "agents." Com. v. Young, 9 Gray (Mass.) 5; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185. Attorney collecting money for client acts as "agent." People v. Converse, 74 Mich. 478, 42 N. W. 70, 16 Am. St. Rep. 648. Post-office department employé not agent of person sending letter. Brewer v. State, 83 Ala. 113, 3 South. 816, 3 Am. St. Rep. 693. Consignee of merchandise for sale. Com. v. Keller, 9 Pa. Co. Ct. R. 253. Who are "officers": President and directors of bank, Com. v. Wyman, 8 Metc. (Mass.) 247; Reeves v. State, 95 Ala. 31, 11 South. 158; unincorporated association, Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166. "Officer, agent, etc., of any corporation," does not include public officers, like clerk of court, State v. Connelly, 104 N. C. 794, 10 S. E. 469; nor does statute against embezzlement by clerk or certain other officers, Id. Who are "trustees": Savings bank officer, Reg. v. Fletcher, 9 Cox, Cr. Cas. 189. Broker, Com. v. Foster, 107 Mass. 221; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185; Morehouse v. State, 35 Neb. 643, 53 N. W. 571. "Bailee" or debtor, Wallis v. State, 54 Ark. 611, 16 S. W. 821. "Trustee" or debtor, Mulford v. People, 139 Ill. 586, 28 N. E. 1096. Pledgee, Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65. Any carrier or "other bailee," State v. Grisham, 90 Mo. 163, 2 S. W. 223. Person "intrusted with money to be delivered to another," Shelburn v. Com., 85 Ky. 173, 3 S. W. 7.

[79] Rex v. Beacall, 1 Car. & P. 457; State v. Spaulding, 24 Kan. 1. Contra, Moore v. State, 53 Neb. 831, 74 N. W. 319.

[80] State v. Brooks, 85 Iowa, 366, 52 N. W. 240.

[81] Com. v. Foster, 107 Mass. 221; State v. Costin, 89 N. C. 511. In State v. Costin, supra, the defendant was regularly employed by a merchant to sweep out the store, and wait about the store, but not as a clerk. He was on one occasion authorized by the merchant to take a lot of shoes and sell them during a visit to a neighboring

Some of the statutes provide that the property received by the servant, clerk, or agent and converted by him must be received "by virtue of his employment." This wording strictly construed, left such flagrant cases of fraudulent misappropriation unpunished that it has been changed in some jurisdictions to the words, "in the course of his employment," or omitted altogether. Some, if not most, of the statutes, declare that such appropriation shall be deemed larceny; but the crime is nevertheless generally known as embezzlement, and is entirely distinct from larceny at common law. Even where a statute has enacted that a person who commits any of various enumerated acts which formerly constituted embezzlement or false pretenses is guilty of larceny, there being several distinct ways in which "larceny" may be committed, the indictment must charge the act so as to inform the accused in which way he is charged; and an indictment charging larceny in the common form would not be sustained by proof of appropriation by the accused having possession as bailee or by proof of obtaining property by false pretense.[82] There are also statutes in most of the states punishing embezzlement by public officers,[83] and

town. He did so and converted the money to his own use. Held, he was a servant within the meaning of the statute.

[82] State v. Farrington, 59 Minn. 147, 60 N. W. 1088, 28 L. R. A. 395; State v. Friend, 47 Minn. 449, 50 N. W. 602.

[83] Justice of the peace a "county officer." Crump v. State, 23 Tex. App. 615, 5 S. W. 182. Deputy sheriff a public officer. State v. Brooks, 42 Tex. 62. Drainage commissioner a county officer. State v. Wells, 112 Ind. 237, 13 N. E. 722. State treasurer. State v. Archer, 73 Md. 44, 20 Atl. 172; People v. McKinney, 10 Mich. 54; Hemingway v. State, 68 Miss. 371, 8 South. 317; State v. Noland, 111 Mo. 473, 19 S. W. 715. Clerk in collector of customs office not a public officer charged with safe-keeping of public money. U. S. v. Smith, 124 U. S. 525, 8 Sup. Ct. 595, 31 L. Ed. 534. By county treasurer. State v. Mims, 26 Minn. 183, 2 N. W. 494, 683; State v. Baumhager, 28 Minn. 226, 9 N. W. 704; State v. Ring, 29 Minn. 78, 11 N. W. 233;

acts of Congress punishing embezzlement by public officers charged with the safe-keeping of public moneys, by national bank officers, and embezzlement from the mails.

As in case of larceny, a special owner, such as a bailee, is doubtless regarded as owner, so that ownership may be laid in him in the indictment.[84] The property must not have belonged to the accused, and there are cases which hold that one cannot embezzle property which he owns jointly with another.[85]

The gist of the offense is breach of trust. The statutes in general do not apply to appropriation of property by any

State v. Czizek, 38 Minn. 192, 36 N. W. 457; State v. King, 81 Iowa, 587, 47 N. W. 775. By city comptroller of negotiable city bonds. State v. White, 66 Wis. 343, 28 N. W. 202. No demand by successor in office is necessary. Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490. Clerk of board of county commissioners not a public officer. State v. Denton, 74 Md. 517, 22 Atl. 305. Need only be a de facto officer. State v. Findley, 101 Mo. 217, 14 S. W. 185.

[84] Consignee has sufficient ownership. Waterman v. State, 116 Ind. 51, 18 N. E. 63. Embezzlement from thief. State v. Littschke, 27 Or. 189, 40 Pac. 167.

[85] Property belonging partly to the accused. State v. Kusnick, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. Rep. 564; State v. Kent, 22 Minn. 41, 21 Am. Rep. 764. Partner cannot embezzle general partnership funds. State v. Reddick, 2 S. D. 124, 48 N. W. 846; State v. Butman, 61 N. H. 511, 60 Am. Rep. 332; Gary v. Northwestern Mut. Life Ass'n, 87 Iowa, 25, 53 N. W. 1086. Contra as to surviving partners, under statute making their duties and liabilities similar to those of executors and administrators. State v. Matthews, 129 Ind. 281, 28 N. E. 703. As an assignment of his unearned salary by a government employé is void as against public policy, he does not embezzle by converting it to his own use when collected. State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358. Where defendant was employed to collect money for the prosecutor, the latter allowing him to deduct a commission from the money collected, and defendant collected a sum of money and converted it all to his own use, it was held to be embezzlement. Com. v. Jacobs, 126 Ky. 536, 104 S. W. 345, 13 L. R. A. (N. S.) 511, 15 Ann. Cas. 1226.

person unless he held a relation of confidence or trust towards the owner, and had possession of the property by virtue of such relation, and converted it in violation of the trust reposed in him. It has therefore been held that where a person drawing his deposit from a bank is by mistake paid more than is due him, and he fraudulently appropriates it, he is not guilty, under a statute punishing "any person to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered," if he "shall embezzle or fraudulently convert" the same to his own use;[88] and no doubt this statute is as broad in its language as any. Ordinarily, if the relation between the parties is such that the relation of debtor and creditor is created by the transaction—as where an agent has authority, derived from the nature of the business or otherwise, to

[88] Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662; People v. Gallagher, 4 Cal. Unrep. Cas. 113, 33 Pac. 890. Person converting money delivered to him for safe-keeping not guilty. Com. v. Williams, 3 Gray (Mass.) 461. Funds of corporation spent by treasurer of corporation before his election not embezzlement. Lee v. Com. (Ky.) 1 S. W. 4. To constitute embezzlement by agent, the property must have come into his possession in the course of, or by virtue of, his employment. Rex v. Snowley, 4 Car. & P. 390; Rex v. Thorley, 1 Moody, Cr. Cas. 343; Rex v. Hantin, 7 Car. & P. 281; Ex parte Hedley, 31 Cal. 108; State v. Goode, 68 Iowa, 593, 27 N. W. 772. Authority in servant to receive money necessary in Iowa. State v. Ridley, 48 Iowa, 370. Where clerk collects bill due his employer without authority he cannot embezzle the money. Brady v. State, 21 Tex. App. 659, 1 S. W. 462. Servant, to be guilty, must have received property for, or in the name of, or on account of, his master. REG. v. CULLUM, L. R. 2 Cr. Cas. 28, Mikell Illus. Cas. Criminal Law, 186; Reg. v. Read, 3 Q. B. Div. 131. Agent receiving employer's money after expiration of employment may be convicted under statute punishing embezzlement by agent of money which has come into his possession "by virtue of his employment." State v. Jennings, 98 Mo. 493, 11 S. W. 980. Person not a public officer, but receiving public money by representing that he is entitled to receive it, not guilty. State v. Bolin, 110 Mo. 209, 19 S. W. 650.

mix the proceeds of a sale with his own funds—appropriation of the property coming into possession of the accused is not embezzlement.[87] Not only must there be a relation of confidence and trust between the person appropriating property and the owner to constitute embezzlement, but the appropriation must be with a fraudulent intent; mere breach of contract, as, for instance, a failure to pay back borrowed money, or a mere neglect to pay over funds, is not sufficient.[88] We have seen that to take property from another's possession under a bona fide claim of right is not larceny. So, also, where a person retains money which he has received under a bona fide claim of right, without secrecy or concealment, no matter how untenable or even frivolous the claim may be, he is not guilty of embezzlement.[89] After an embezzlement, an offer or intent to restore the money, or even a settlement with the owner by de-

[87] Com. v. Stearns, 2 Metc. (Mass.) 343; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185; Com. v. Foster, 107 Mass. 221; Mulford v. People, 139 Ill. 586, 28 N. E. 1096; People v. Wadsworth, 63 Mich. 500, 30 N. W. 99; State v. Covert, 14 Wash. 652, 45 Pac. 304. And see cases cited in note 12, infra.

[88] Kribs v. People, 82 Ill. 425; People v. Galland, 55 Mich. 628, 22 N. W. 81; Fitzgerald v. State, 50 N. J. Law, 475, 14 Atl. 746; People v. Hurst, 62 Mich. 276, 28 N. W. 838; Penny v. State, 88 Ala. 105, 7 South. 50; Etheridge v. State, 78 Ga. 340; Stallings v. State, 29 Tex. App. 220, 15 S. W. 716; Home Lumber Co. v. Hartman, 45 Mo. App. 647. Even where statute is silent as to intent. State v. Myers, 23 Wkly. Law Bul. (Ohio) 251. Use of money by guardian. Myers v. State, 4 Ohio Cir. Ct. R. 570. Intent to replace money no defense. State v. Trolson, 21 Nev. 419, 32 Pac. 930. Demand not necessary. State v. New, 22 Minn. 76; Wallis v. State, 54 Ark. 611, 16 S. W. 821; Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; State v. Comings, 54 Minn. 359, 56 N. W. 50. For a discussion of the question of intent, see State v. Trolson, 21 Nev. 419, 32 Pac. 930. See, also, State v. Kortgaard, 62 Minn. 7, 64 N. W. 51.

[89] Reg. v. Norman, Car. & M. 501. And see cases in preceding note.

fendant's bondsmen, does not purge him of his guilt, or prevent his punishment.[90]

CHEATING AT COMMON LAW

101. A cheat at common law is the fraudulent obtaining of another's property by means of some false symbol or token, such as, when not false, is commonly accepted by the public for what it purports to represent; provided the act does not amount to a felony.[91]

102. The crime is a misdemeanor.

The books differ in their definitions of this crime. Some of them assert that it is essential that the cheat shall be effected by means of a false symbol or token;[92] others, that it may be effected by means of deceitful and illegal practices and devices without the use of a false token.[93] The latter term might include other means than symbols and tokens.[94] In any case, the symbol, token, device, or practice must be such that common prudence cannot guard

[90] Robson v. State, 83 Ga. 166, 9 S. E. 610; Fleener v. State, 58 Ark. 98, 23 S. W. 1; State v. Pratt, 98 Mo. 482, 11 S. W. 977; People v. De Lay, 80 Cal. 52, 22 Pac. 90.

[91] 19 Cyc. 388. See, also, 2 East, P. C. 817; People v. Garnett, 35 Cal. 470, 95 Am. Dec. 125.

[92] 2 Bish. New Cr. Law, § 143.

[93] 2 Whart. Cr. Law, 116; Steph. Dig. Cr. Law, art. 338.

[94] This difference in definition is due to the fact that this crime was not very clearly defined at early common law. Subsequently cheats were divided into two kinds: (1) Those affecting the government; (2) those affecting individuals. In the first kind, any fraudulent device was sufficient; in the second, a false token was essential. In modern times the second kind only are called cheats, though the first are indictable as misdemeanors. 19 Cyc. 387, 388.

against it. Mere lies and false representations are not sufficient.[95] Thus, if a merchant gives a customer less than the full measure, telling him that it is a full measure, but not weighing it out to him, this is not a cheat, but a mere lie. If, on the other hand, by using a false measure, he gives him less than the full measure, it is a cheat, the false measure being a token. On the prosecution of a brewer for delivering a less quantity of beer than he had contracted to deliver, but without the use of any false measure, the offense was held not to be an indictable cheat. Lord Mansfield said: "That the offense here charged should not be considered as an indictable offense, but left to a civil remedy, by an action, is reasonable and right in the nature of the thing, because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor upon receiving it, to see whether it held out the just measure or not. The offense that is indictable must be such a one as affects the public, as if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing; so if a man defrauds another under false tokens, for these are deceptions that common care and prudence are not sufficient to guard against. Those cases are much more than mere private injuries; they are public offenses. But here is a mere private imposition or deception." [96] So, where the defendant went to A., pretending that B. had sent him to receive a sum of money, and A. gave it to him, the court said: "It is not indictable unless he came with false tokens; we are

[95] Com. v. Warren, 6 Mass. 72; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256.

[96] Rex v. Wheatley, 2 Burrows, 1125.

not to indict one man for making a fool of another." [97] So it has been held not to be a cheat to pay for property with the note of a third party which note was of no value; [98] the court saying: "It is in its consequences and effects confined to the parties to the transaction, and thus at once shows that no prosecution at common law can be sustained."

Among the various false symbols and tokens are false measures, false weights, false marks of weight, false stamps, counterfeit orders, seals, dies, marked cards, etc.[99] The token itself need not be public, as an old English statute, which is part of our common law, makes it a cheat to defraud by means of a privy token.[1]

CHEATING BY FALSE PRETENSES

103. Obtaining property by false pretenses, not amounting to a common-law cheat, is not a crime at common law, but is very generally made so by statute.

104. The statutes generally define the crime substantially as the knowingly and designedly obtaining of the property of another by false pretenses, with intent to defraud.

(a) The pretense must be a false representation as to some past or existing fact or circumstance, and not a mere expression of opinion or a promise.

[97] Reg. v. Jones, 1 Salk. 379.

[98] State v. Middleton, Dud. (S. C.) 275.

[99] See State v. Jones, 70 N. C. 75; Com. v. Speer, 2 Va. Cas. 65; Jones v. State, 50 Ind. 473. False bank bill or note. Com. v. Boynton, 2 Mass. 77; Lewis v. Com., 2 Serg. & R. (Pa.) 551; State v. Stroll, 1 Rich. (S. C.) 244; State v. Middleton, Dud. (S. C.) 275. Bread under weight. Respublica v. Powell, 1 Dall. (Pa.) 47, 1 L. Ed. 31.

[1] 33 Hen. VIII, c. 1, § 2; 2 Bish. New Cr. Law, § 157.

(b) It must be knowingly false.
(c) It must be made with intent to defraud.
(d) Some cases hold it must be calculated to defraud.
(e) It must deceive and defraud; that is,
(1) It must be believed, and
(2) The property must be parted with,
(3) Because of the representation.

As has already been shown, one who obtains property from another by false and fraudulent representations does not commit larceny where the owner intends to part with his ownership; nor is he guilty of the common-law crime of cheating, as the cheat is only a private fraud. At common law, therefore, he went unpunished. These statutes against false pretenses were intended to fill this gap in the common law. The term "false pretenses" is not intended to cover cases of cheating where false symbols or tokens are used, but means false representations as to facts.

The representation must be as to a past or existing fact or circumstance, and not as to something to happen in the future. Nor is a mere promise to do something in the future a false pretense.[2] But if there is a false representation, except for which the property would not have been obtained, it is immaterial that it is united with a promise.[3] An example of the crime is where one obtains goods on credit by falsely representing that he is in business, or is solvent.[4] This is a representation as to an existing fact.

[2] Com. v. Moore, 89 Ky. 542, 12 S. W. 1066; Scarlett v. State, 25 Fla. 717, 6 South. 767; Thomas v. State, 90 Ga. 437, 16 S. E. 94.

[3] Obtaining money on false statement that accused was unmarried, would marry giver, and lay out money on a house. Reg. v. Jennison, 9 Cox, Cr. Cas. 158; State v. Thaden, 43 Minn. 325, 45 N. W. 614.

[4] Higler v. People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267;

One, however, who obtains goods on credit, on the representation that he will pay for them, is not guilty, as this is a mere promise.[5] So, also, for a person to obtain property from another by means of a false representation that he will get a position for him is not obtaining property by false pretenses, within the meaning of the statute;[6] but it is otherwise if the representation is that he has got him a position.[7] To obtain property from a merchant by falsely representing that another has authorized the purchase on his credit is within the statute.[8] So is pretending to be sent by another for money.[9] A false representation by an officer of a bank that the bank is solvent is a representation as to an existing fact.[10] So is a statement that one has just purchased a farm [11] or that a certain package is intended for a certain person.[12]

A request for a loan of money saying, "I am going to pay my rent," is a mere representation as to the future, and not a false pretense within the statute.[13] A statement that one

State v. Sumner, 10 Vt. 587, 33 Am. Dec. 219; Taylor v. Com., 94 Ky. 281, 22 S. W. 217.

[5] Rex v. Goodhall, Russ. & R. 461; Reg. v. Walne, 11 Cox, Cr. Cas. 647; Glacken v. Com., 3 Metc. (Ky.) 233; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271.

[6] Ranney v. People, 22 N. Y. 413. But see People v. Winslow, 39 Mich. 505.

[7] Com. v. Parker, Thach. Cr. Cas. (Mass.) 24.

[8] People v. Johnson, 12 Johns. (N. Y.) 292.

[9] State v. Dixon, 101 N. C. 741, 7 S. E. 870.

[10] Com. v. Wallace, 114 Pac. 405, 6 Atl. 685, 60 Am. Rep. 353.

[11] State v. Fooks, 65 Iowa, 452, 21 N. W. 773.

[12] State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

[13] Reg. v. Lee, Leigh & C. 309. In State v. Fooks, 65 Iowa, 196, 21 N. W. 561, defendant borrowed money on the false pretense that his brother was to arrive with money for him, coupled with a promise to use it in payment of the sum borrowed. This was held to amount to a pretense that he had the money.

has credit with the drawee of a draft, and that the draft will be paid is a false pretense.[14] Where defendant came to the prosecutor and said he had come to pay a debt and thus obtained a receipt for the debt, it was held that he was properly convicted of obtaining the receipt by a false pretense; the court saying: "The pretense was the act of coming, and the averment that defendant had come to pay the money. * * * The act of the defendant in coming to the other party, proclaiming his intention and purpose to pay the money, is readily distinguishable from a promise so to do.[15]

Mere statements of opinion as distinguished from statements of fact are not false pretenses within the meaning of the statute. Thus a statement that land is worth a certain sum,[16] or is nicely located,[17] or that a mortgage is sufficient security[18] is a mere expression of opinion, and not indictable. So-called "puffing statements" or exaggerations

[14] People v. Wasservogle, 77 Cal. 173, 19 Pac. 270.

[15] State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271.

[16] State v. Paul, 69 Me. 215.

[17] People v. Jacobs, 35 Mich. 36. Defendant, by a false representation that certain land was worth $11,000, induced the prosecutor to pay him that sum for the land. The land was in fact worth only $330. It was held that when a statement as to value is made as an existing fact, and not as a matter of opinion, and is so understood and relied upon by the other party, it is a false pretense. Williams v. State, 77 Ohio St. 468, 83 N. E. 802, 14 L. R. A. (N. S.) 1197.

[18] People v. Gibbs, 98 Cal. 661, 33 Pac. 630. Otherwise as to representations as to value of railroad bonds, People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73, and as to bill of broken bank, Com. v. Stone, 4 Metc. (Mass.) 43. Otherwise, also, in case of false representation by seller of horse that it is sound and kind, State v. Wilkerson, 103 N. C. 337, 9 S. E. 415; State v. Burke, 108 N. C. 750, 12 S. E. 1000; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; State v. Stanley, 64 Me. 157; Jackson v. People, 126 Ill. 139, 18 N. E. 286; and by seller of sheep that they are sound, People v. Crissie, 4 Denio (N. Y.) 525.

or praise of an article for the purpose of selling it are not false pretenses. Thus a false statement that certain plated spoons were equal to "Elkinton's A," and had as much silver on them, was held to be mere puffing, and not within the statute.[19] On the other hand, the same court held that a statement that a chain was "15 carat gold, and you will see it stamped on every link," was not mere puffing, but a statement of fact.[20] Specific statements regarding the quantity or weight of the article are usually held to be statements of fact.[21]

No particular form of representation is necessary to constitute the offense. The pretense may be made by a writing, by word of mouth, or even by actions. Thus, obtaining goods by giving the owner a check on a bank in which the drawer giving the check knows he has no funds, is within the statute.[22] The representation is usually made by words, but it may be made by conduct.[23] Thus, a person who fraudulently wore a cap and gown to lead tradesmen to believe he was a student at the University of Oxford, and thereby procured goods from them, was held

[19] Reg. v. Bryan, 7 Cox, Cr. Cas. 312.

[20] Reg. v. Ardley, 12 Cox, Cr. Cas. 23.

[21] Reg. v. Ridgway, 3 Fost. & F. 838; Reg. v. Ragg, 8 Cox, Cr. Cas. 262.

[22] Rex v. Jackson, 3 Camp. 370; Rex v. Parker, 7 Car. & P. 825; Barton v. People, 35 Ill. App. 573, affirmed in 135 Ill. 405, 25 N. E. 776, 10 L. R. A. 302, 25 Am. St. Rep. 375. Otherwise if one obtains money at a bank where one has an account, by presenting a check on the bank, though with knowledge that the account is overdrawn. Com. v. Drew, 19 Pick. (Mass.) 179. Falsely personating officer to extort money, Perkins v. State, 67 Ind. 270, 33 Am. Rep. 89; People v. Stetson, 4 Barb. (N. Y.) 151; McCord v. People, 46 N. Y. 470; Com. v. Henry, 22 Pa. 253. False pretenses by pretending physician, Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71. Personating collector, Hall v. Com. (Ky.) 9 S. W. 409.

[23] Reg. v. Goss, 8 Cox, Cr. Cas. 262 (showing false sample).

guilty;[24] and where a person who had been placed on the list of county paupers afterwards removed from the county, and ceased to be entitled to relief, one who continued to apply for and draw her monthly stipend was held guilty, on the ground that every fresh application was a reaffirmance of the alleged pauper's continuing rights as such.[25]

Intent to defraud by the representation is an essential element of the crime. There can be no such intent unless the person making the representation believed it to be false. In order to convict one of this crime, therefore, it is necessary to prove that he knew the representation to be untrue.[26] Not only must there be knowledge that the pretense is false, but it must be made with intent to defraud.[27] This intent is the intent to induce the owner of the property to part with it when he would not otherwise do so, if not moved thereto by the false pretense.[28] If this intent is present, it is immaterial that the accused intended later to return the property,[29] or to apply it to the satisfaction of injuries he had received from the prosecutor.[30] The intent

[24] Rex v. Barnard, 7 Car. & P. 784.

[25] State v. Wilkerson, 98 N. C. 696, 3 S. E. 683.

[26] Sharp v. State, 53 N. J. Law, 511, 21 Atl. 1026; Com. v. Devlin, 141 Mass. 423, 6 N. E. 64.

[27] Rex v. Wakeling, Russ. & R. 504 (stating to parish officer that accused had no clothes, when a mere excuse for not working, and not a false pretense to obtain clothes); Reg. v. Stone, 1 Fost. & F. 311; People v. Getchell, 6 Mich. 496; Com. v. Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Blum v. State, 20 Tex. App. 578, 54 Am. Rep. 530; People v. McAllister, 49 Mich. 12, 12 N. W. 891; People v. Wakely, 62 Mich. 297, 28 N. W. 871; In re Cameron, 44 Kan. 64, 24 Pac. 90, 21 Am. St. Rep. 262. Procuring indorsement of draft, believing it will be honored. Ketchell v. State, 36 Neb. 324, 54 N. W. 564.

[28] Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77.

[29] State v. Neimeier, 66 Iowa, 634, 24 N. W. 247; Com. v. Coe, 115 Mass. 481.

[30] Com. v. Burton, 183 Mass. 461, 67 N. E. 419.

to defraud need not have been present when the false pretense was first made, if it was present when the pretense was reiterated;[81] it must exist, however, when the property is obtained.[82] Not only must there be a false pretense made with intent to defraud, but the prosecutor must part with the property relying on the pretense. If, therefore, he knows that the pretense is false when he parts with the property, the offense is not committed.[83] So, though believing it, he yet relies on some other inducement in parting with his property, the property is not obtained by means of the false pretense and the accused cannot be convicted.[84]

It is sometimes said, that if the pretense be too "remote" from the obtaining of the goods, the crime is not committed; and so when accused obtained lodging with the prosecutor by falsely representing that he was a naval officer, and some weeks later made a contract with the prosecutor for board also. The court held that the pretense of being a naval officer was too remote from the obtaining of the board to permit of conviction for obtaining the board by false pretense.[85] The true reason for holding the defendant not guilty in this class of case would seem to be that the board was not obtained by means of the false pretense; i. e., that the prosecutor did not rely on the false pretense, but furnished the board to the individual and not to him as a naval officer.[86]

The pretense need not, however, be the sole cause induc-

[81] Reg. v. Hamilton, 1 Cox, Cr. Cas. 244.

[82] Popinaux v. State, 12 Tex. App. 140.

[83] Reg. v. Mills, 7 Cox, Cr. Cas. 263.

[84] Rex v. Dale, 7 Car. & P. 352; Baker v. State, 120 Wis. 135, 97 N. W. 566; State v. Stone, 75 Iowa, 215, 39 N. W. 275.

[85] Reg. v. Goodwin, Dears. & B. 41. See, also, Reg. v. Bryan, 2 Fost. & F. 567.

[86] See People v. Whiteman, 72 App. Div. 90, 76 N. Y. Supp. 211.

ing the prosecutor to part with the property; it is sufficient if it materially influenced him.[37] It is also essential to this crime that the prosecutor be defrauded.[38] But he may be defrauded in the eye of the law, though he suffer no ultimate pecuniary loss by the transaction.[39] If the pretense defrauds, it is immaterial that the person defrauded parts with his property from motives of charity, and not of self-interest.[40] It has been held that a man is not defrauded who by false pretenses is induced to pay what is due.[41] It

[37] Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; People v. Haynes, 11 Wend. (N. Y.) 557; State v. Thatcher, 35 N. J. Law, 445; People v. McAllister, 49 Mich. 12, 12 N. W. 891; State v. Fooks, 65 Iowa, 196, 21 N. W. 561; State v. Metsch, 37 Kan. 222, 15 Pac. 251; State v. Stone, 75 Iowa, 215, 39 N. W. 275. False pretense after goods have been obtained not within the statute. People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530. And see State v. Willard, 109 Mo. 242, 19 S. W. 189. Obtaining deed in exchange; effect of covenants in deed given. State v. Butler, 47 Minn. 483, 50 N. W. 532. See, also, Com. v. Lee, 149 Mass. 179, 21 N. E. 299. Representations as to title of land are not indictable where the person to whom they were made did not rely on them, but had his attorney examine the title. People v. Gibbs, 98 Cal. 661, 33 Pac. 630. False pretense of supernatural power to cure is not impaired by promise to exercise it. Jules v. State, 85 Md. 305, 36 Atl. 1027.

[38] Misrepresenting value of note given as security not indictable where other notes given at the time are a sufficient protection. State v. Palmer, 50 Kan. 318, 32 Pac. 29. In a recent case the defendant was indicted for obtaining money by false pretense from M. It was proved that the money obtained from M. belonged to one F., of whom M. was agent. It was held that defendant could not be convicted, as M., not being the owner of the money, could not be defrauded by the act of the defendant. Martins v. State, 17 Wyo. 319, 98 Pac. 709, 22 L. R. A. (N. S.) 645, but see Com. v. Call, 21 Pick. (38 Mass.) 515.

[39] State v. Porter, 75 Mo. 171; People v. Cook, 41 Hun (N. Y.) 67.

[40] Com. v. Whitcomb, 107 Mass. 486; Reg. v. Jones, 1 Denison, Cr. Cas. 551; State v. Carter, 112 Iowa, 15, 83 N. W. 715. Contra, People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

[41] Com. v. McDuffy, 126 Mass. 467; People v. Thomas, 8 Hill

is held by many courts that the pretense must also be to some extent calculated to deceive; that is, that it must not be plainly absurd or irrational, and the person defrauded must not be guilty of gross carelessness.[43] It is not necessary, however, that any false token shall be used, or that the pretense shall be such that ordinary care and common prudence could not guard against it, as in the case of cheating at common law.[44] In determining whether it was calculated to deceive, it must be considered with reference to all the circumstances, and the intelligence of the person defrauded.[44] Gross carelessness on his part is a defense, but

(N. Y.) 169 (inducing payment of note by pretending it is lost). In State v. Williams, 68 W. Va. 86, 69 S. E. 474, 32 L. R. A. (N. S.) 420, defendant falsely represented that he had been sent to buy a cow for another. He and the prosecutor agreed on a price, and defendant took the cow away. Later, instead of paying the price, the defendant offered the seller a judgment against the seller, which had been assigned to the defendant, for a larger sum than the agreed price of the cow. It was held that this was not an obtaining of the cow by false pretense.

[42] People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530; Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; Com. v. Drew, 19 Pick. (Mass.) 179; People v. McAllister, 49 Mich. 12, 12 N. W. 891; State v. Estes, 46 Me. 150; State v. De Hart, 6 Baxt. (Tenn.) 222; Burrow v. State, 12 Ark. 65; State v. Young, 76 N. C. 258; People v. Williams, 4 Hill (N. Y.) 9, 40 Am. Dec. 258. Pretending to be witch doctor, State v. Burnett, 119 Ind. 392, 21 N. E. 972.

[43] People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530; People v. Rice, 59 Hun, 616, 13 N. Y. Supp. 161; Id., 128 N. Y. 649, 29 N. E. 146; Lefler v. State, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St. Rep. 300; State v. Southall, 77 Minn. 296, 79 N. W. 1007.

[44] Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71; Cowen v. People, 14 Ill. 348; State v. Mills, 17 Me. 211; Smith v. State, 55 Miss. 513; Johnson v. State, 36 Ark. 242; State v. McConkey, 49 Iowa, 499; State v. Montgomery, 56 Iowa, 195, 9 N. W. 120; State v. Davis, 56 Iowa, 202, 9 N. W. 123; People v. Summers, 115 Mich. 537, 73 N. W. 818. Whether the pretense was relied on, and the other was defrauded thereby, is for the jury, though it appears

mere credulity is not.[45] The pretense must be false in fact. If it turns out to be true, the crime is not committed, though the accused really believed it to be false, and intended to defraud.[46] The fact that the person defrauded also made false representations, with intent to defraud, is no defense.[47]

What property may be the subject of false pretenses must, of course, be determined by the statute. As a rule, however, it must be such as may be the subject of larceny.

that, if he had used ordinary prudence, he would not have been misled. State v. Knowlton, 11 Wash. 512, 39 Pac. 966.

[45] State v. Fooks, 65 Iowa, 196, 21 N. W. 561; People v. Cole, 65 Hun, 624, 20 N. Y. Supp. 505; Id., 137 N. Y. 530, 33 N. E. 336; Oxx v. State, 59 N. J. Law, 99, 35 Atl. 646. And see cases cited in preceding note. To convict of the crime of obtaining money by false pretenses, it is not necessary to show that the offense was one against which common prudence and care would be insufficient to guard. People v. Ozboda, N. Y. Law J. Jan. 15, 1903. Contra, State v. Hood, 3 Pennewill (Del.) 418, 53 Atl. 437. See, further, 3 Col. Law Review, 204.

[46] Thus, it was held that a representation by a second mortgagee, with a fraudulent intent, that his mortgage was a first mortgage, was not within the statute, where the first mortgagee had induced him to make the representation, for the reason that the first mortgagee thereby became estopped, and in effect made the second mortgage a prior lien. State v. Asher, 50 Ark. 427, 8 S. W. 177. So, also, where a person fraudulently represented that a certain crop was not covered by a mortgage, and it turned out that, because of a defect in the description in the mortgage, it was not in fact covered. State v. Garris, 98 N. C. 733, 4 S. E. 633.

[47] Com. v. Morrill, 8 Cush. (Mass.) 571; People v. Watson, 75 Mich. 582, 42 N. W. 1005; Reg. v. Hudson, 8 Cox, Cr. Cas. 305; In re Cummins, 16 Colo. 451, 27 Pac. 887, 13 L. R. A. 752, 25 Am. St. Rep. 291. And see People v. Henssler, 48 Mich. 50, 11 N. W. 804, where it was held that the fact that one whose indorsement on a note was procured by false pretenses knew that his indorsement was to be used dishonestly was no defense. See, also, Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77. But see McCord v. People, 46 N. Y. 470.

It has been held that the statute did not apply to a dog,[48] or to a conveyance of land,[49] or to a case where the accused obtained board and lodging by false pretenses.[50]

To constitute the crime of false pretenses it is essential that there should be an intention on the part of the accused to deprive the owner wholly of his property, and an intention on the part of the owner to transfer the property. Obtaining the temporary use of an article by false pretenses is not within the statute.[51] It seems, however, that it is not essential that the property actually pass, provided the owner has the intention to transfer the property. It has been so held where goods are obtained from a tradesman by the accused under the false pretense that he comes from a customer for whom the goods are intended, although in such case no property passes.[52] The crime of obtaining goods by false pretense is not consummated until the goods have been acquired. Hence, if the false pretense is made in one jurisdiction and the goods are obtained in another, the defendant can be indicted only in the latter.[53]

[48] Reg. v. Robinson, Bell, Cr. Cas. 34.

[49] State v. Burrows, 33 N. C. 477; People v. Cummings, 114 Cal. 437, 46 Pac. 284.

[50] State v. Black, 75 Wis. 490, 44 N. W. 635. See, also, Reg. v. Gardner, 7 Cox, Cr. Cas. 136.

[51] Reg. v. Kilham, L. R. 1 Cr. Cas. 261; Cline v. State, 43 Tex. 494; 2 Bish. Cr. Law, § 477.

[52] Rex v. Adams, Russ. & R. 225; People v. Johnson, 12 Johns. (N. Y.) 292; Whart. Cr. Law, § 1142. The title to the property need not pass to the accused. Com. v. Langley, 169 Mass. 89, 47 N. E. 511.

[53] State v. Smith, 162 Iowa, 336, 144 N. W. 32, 49 L. R. A. (N. S.) 834; Graham v. People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731. See, further, 14 Col. Law Review, 351.

ROBBERY

105. Robbery is an aggravated form of larceny, but is treated as a distinctive crime. It is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation.[54]

106. To constitute the crime

(a) The property must be such as may be the subject of larceny.

(b) It must be taken and carried away, as in case of larceny.

(c) It must be taken from another's person, or in his presence.

(d) It must be so taken by violence or by putting in fear.

(e) It must be taken with intent to steal.

107. Robbery is a felony at common law.[55]

Robbery is at once a crime against the person and a crime against property. The elements necessary to constitute the crime of larceny are also essential to constitute robbery, and it is not necessary to repeat them here. There are, however, these further essentials: The taking must be either from the owner's person, as where money is forcibly taken from his pocket; or in his actual presence, so that the thing taken is virtually under the protection of his person, as where he is by force or intimidation compelled to open his desk or safe, or where he is compelled to stand still while his cattle are driven off or other property taken.[56]

[54] 1 Whart. Cr. Law, § 846.

[55] 3 Inst. 68.

[56] Rex v. Francis, 2 Strange, 1015; Reg. v. Selwag, 8 Cox, Cr. Cas.

Furthermore, some violence or intimidation must be used in the taking, or it is merely larceny.[57] Pocket picking by stealth merely is not robbery; nor is it robbery to snatch a thing from the person, when no resistance is offered either by the person or the thing;[58] but it is otherwise if there is a struggle by the owner to keep the property, or

235; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; Bussey v. State, 71 Ga. 100, 51 Am. Rep. 256; U. S. v. Jones, 3 Wash. C. C. 209, 216, Fed. Cas. No. 15,494; Clements v. State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385; Williams v. State, 12 Tex. App. 240; State v. Calhoun, 72 Iowa, 432, 34 N. W. 194, 2 Am. St. Rep. 252; HILL v. STATE, 42 Neb. 503, 60 N. W. 916, Mikell Illus. Cas. Criminal Law, 195. Where robbers forcibly entered an express car, ejected the agent by violence, cut the train in two, and moved the forward portion a quarter of a mile, and then blew open the safe, there was a taking by force and violence in presence of the agent, though he was not actually present when the safe was opened. State v. Kennedy, 154 Mo. 268, 55 S. W. 293. In Wright's Case, Style, 56, it was resolved that if a man's servant be robbed of his master's goods in the sight of the master, this shall be taken for a robbing of the master. And if one cast away his goods to save them from a robber, and the robber take them up and carry them away, this is a robbery done to his person.

[57] State v. John, 50 N. C. 163, 69 Am. Dec. 777. One who takes money from the pocket of a person forcibly held by a confederate commits robbery. Wheeler v. Com., 86 Va. 658, 10 S. E. 924. The violence need not intimidate. People v. Glynn, 54 Hun, 332, 7 N. Y. Supp. 555. See, also, note 59. Where A., pretending to be a policeman, takes hold of B., who is intoxicated, and tells B. he must go to jail and it is necessary to search him before going, and goes through his pockets and takes money from him, this constitutes robbery, it being sufficient "that the person assaulted was intimidated and yielded up his property because of the force used and threatened, be the same ever so slight." State v. Parsons, 44 Wash. 299, 87 Pac. 349, 7 L. R. A. (N. S.) 566, 120 Am. St. Rep. 1003, 12 Ann. Cas. 61.

[58] Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; State v. Miller, 83 Iowa, 291, 49 N. W. 90; Doyle v. State, 77 Ga. 513; Territory v. McKern, 3 Idaho (Hasb.) 15, 26 Pac. 123; Fanning v. State, 66 Ga. 167; Spencer v. State, 106 Ga. 692, 32 S. E. 849. Ante, p. 317, note 46.

if it is detached by force, as, for instance, where a watch chain is broken in snatching a watch, for in the first case force is used to overcome the resistance of the person, and in the second case to overcome the resistance offered by the object taken.[59]

Intimidation, or putting in fear, will supply the place of force.[60] Thus, where several persons surrounded the prosecutor, so as to make resistance appear useless to him, and took away his watch, without force, it was held to be robbery.[61] The intimidation need not have been engendered originally with the object of stealing from the prosecutor. Thus, where a man assaulted a woman with the object of committing rape, and she without any demand from him offered him money, which he took, this was held to be robbery, for the money was given, not voluntarily, but because of fear.[62]

The fear need not necessarily be of personal violence; fear of having one's house burned,[63] or of being accused of an unnatural crime,[64] is sufficient. No other threat to injure merely the reputation is sufficient intimidation in law

[59] 2 Russ. Crimes, 419; Rex v. Lapier, 2 East, P. C. 557; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; State v. Trexler, 4 N. C. 188, 6 Am. Dec. 558.

[60] 2 East, P. C. 711. "Violence may be used for four purposes: (1) To prevent resistance. (2) To overcome the party. (3) To obtain possession of the property. (4) To effect an escape. Either of the first two makes the offense robbery. The last, I presume it will be conceded, does not. The third is a middle ground. In general it does not make the offense robbery, but sometimes, according to some of the cases, it does." Pearsen, J., in State v. John, 50 N. C. (5 Jones, Law) 167, 69 Am. Dec. 777.

[61] HUGHES' CASE, 1 Lewin, 301, Mikell Illus. Cas. Criminal Law, 195.

[62] Rex v. Blockham, 2 East, P. C. 711.

[63] Rex v. Astley, 2 East, P. C. 729.

[64] Donolly's Case, 2 East, P. C. 715.

to constitute robbery, even though the prosecutor part with his property because of such threat;[65] and it has been held that the threat to accuse of sodomy must be made directly to the person from whom the property is demanded to supply this element of robbery.[66]

The threat of violence must be such as to create a reasonable apprehension of danger or it is not sufficient to make the taking robbery.[67] The force, or intimidation supplying force, must be in the taking, and therefore to take money from another without force, and afterwards resist when the owner seeks to retake it, is not robbery; nor would a struggle to get away after the taking supply force in the taking.[68] To take one's own property by force is not robbery, for, as in larceny, the property must be another's;[69] and for a person to take property by force under a bona fide belief that it belongs to him is not robbery, for there must be the same felonious intent as in case of larceny.[70] Felonious intent is always essential, and an in-

[65] 2 Bish. New Cr. Law, § 1173.

[66] Rex v. Edward, 1 Moo. & R. 257. In this case the threat was made to the prosecutor that the defendant would accuse her husband of sodomy.

[67] Long v. State, 12 Ga. 293.

[68] 2 East, P. C. 707; Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; Fanning v. State, 66 Ga. 167; Thomas v. State, 91 Ala. 34, 9 South. 81; Jones v. Com., 115 Ky. 592, 74 S. W. 263, 103 Am. St. Rep. 340; Dawson v. Com. (Ky.) 74 S. W. 701. But see Sherman v. State, 4 Ohio Cir. Ct. R. 531, holding that it is robbery to snatch property without using force or intimidation, and, immediately after seizing it, to strike the owner, and run. The ground of the decision was that the violence was concomitant with the taking.

[69] Barnes v. State, 9 Tex. App. 128. Where, by law, the winner of money at gaming is not entitled even to possession, it is not robbery for the loser to forcibly take it from him. Thompson v. Com. (Ky.) 18 S. W. 1022; Sikes v. Com. (Ky.) 34 S. W. 902. See, also, ante, p. 314.

[70] Rex v. Hall, 3 Car. & P. 409; People v. Hall, 6 Parker, Cr. R.

struction ignoring that element is ground for reversing a conviction.[71] As said above, it has been held not to be robbery to extort money through false imprisonment or threats of a criminal prosecution, except where the threat is to prosecute for an unnatural crime, for in that case the mere accusation, though false, would so injure a person that fear of it would naturally cause him to give up his property;[72] but it is otherwise if the threats are accompanied by force, actual or constructive, and the property is given up because of the force.[73] As in the case of larceny, the person robbed need not own the property. Possession is sufficient.[74] Consent to taking will prevent it from being robbery, for the intent must be to take the property under such circumstances that the taking, in the absence of force or intimidation, would be larceny.[75]

(N. Y.) 642; People v. Hughes, 11 Utah, 100, 39 Pac. 492. For a person to compel another by threats to pay him money which he believes to be justly due him is not robbery. State v. Hollyway, 41 Iowa, 200, 20 Am. Rep. 586. And see State v. Brown, 104 Mo. 365, 16 S. W. 406; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242. See, also, ante, p. 343.

[71] Com. v. White, 133 Pa. 182, 19 Atl. 350, 19 Am. St. Rep. 628; Woods v. State (Miss.) 6 South. 207; State v. O'Connor, 105 Mo. 121, 16 S. W. 510.

[72] 1 Russ. Crimes, 118, 119; Long v. State, 12 Ga. 293, at page 319; Britt v. State, 7 Humph. (Tenn.) 45; People v. McDaniels, 1 Parker, Cr. R. (N. Y.) 198; Thompson v. State, 61 Neb. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

[73] Bussey v. State, 71 Ga. 100, 51 Am. Rep. 256; McCormick v. State, 26 Tex. App. 678, 9 S. W. 277; Sweat v. State, 90 Ga. 315, 17 S. E. 273.

[74] Stegar v. State, 39 Ga. 583, 99 Am. Dec. 472; Durand v. People, 47 Mich. 332, 11 N. W. 184; Com. v. Clifford, 8 Cush. (Mass.) 215; State v. Hobgood, 46 La. Ann. 855, 15 South. 406. See, also, ante, p. 314.

[75] Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295. See, also, ante, p. 320.

RECEIVING STOLEN GOODS

108. Receiving stolen goods is possibly a substantive misdemeanor at common law, but this is doubtful. It is very generally made a crime by statute.

109. To constitute the crime

(a) The property must have been stolen, and must retain such character when received.

(b) It must be taken into the possession, though not necessarily manual possession, of the receiver, with the consent of the person from whom it is received.

(c) The receiver must know that it was stolen.

(d) The receiver must have felonious intent.

It seems probable that at common law one who received stolen goods knowing them to have been stolen was only guilty of a misprison or compounding of a felony, and afterwards, under an English statute, as accessary after the fact to the larceny,[76] though there is authority for saying that the reception of stolen goods was a substantive misdemeanor at common law.[77] There are now, however, in England, and doubtless in all the states, statutes making the receiving a substantive offense if the recipient knows the goods were stolen.

To constitute this crime, not only must the goods have once been stolen, but the character of the goods as stolen goods must exist at the time they are received.[78] If the goods were not in fact stolen, or if they have come again into the owner's possession, and thus cease to have the

[76] 2 Bish. New Cr. Law, § 1137.

[77] 1 Hale, P. C. 620; Fost. Cr. Law, 373; 1 Whart. Cr. Law, § 982: People v. Reynolds, 2 Mich. 422.

[78] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

character of stolen goods, and are then given to another to sell, for the purpose of entrapping, or any other purpose, one who receives them is not guilty, though he may believe them stolen.[79] As has been seen, one who takes stolen goods from one who has himself stolen them commits larceny from the thief if the requisite elements of intent and trespass are present. The receiving, therefore, must be with the consent of the person from whom the goods are received.[80] Receiving goods from one who guiltily received them from the thief has been held not to be receiving stolen goods, as in the first receiver's hands the goods are not stolen goods.[81] But this does not mean that the receiver must receive the stolen goods directly from the thief. If he receives them from an innocent agent of the thief, knowing them to be stolen, he is guilty of receiving, for in such case he is regarded as receiving them from the thief.[82] And under the statutes in some states it seems that he may be convicted of receiving from a receiver.[83] The fact that one

[79] Reg. v. Dolan, 6 Cox, Cr. Cas. 449; U. S. v. De Bare, 6 Biss. 358, Fed. Cas. No. 14,935; People v. Montague, 71 Mich. 318, 39 N. W. 60; Reg. v. Schmidt, 10 Cox, Cr. Cas. 172; Reg. v. Villensky, [1892] 2 Q. B. 597; Reg. v. Hancock, 14 Cox, Cr. Cas. 119. A clerk, while stealing goods for the purpose of selling them to the defendant, was apprehended; but the owner, after recovering the goods, redelivered them to the clerk to sell to the defendant, in order that he might be entrapped. Defendant bought the goods, believing them to be stolen. He was indicted for receiving stolen goods. It was held that a conviction of an attempt to commit the crime charged was error. PEOPLE v. JAFFE, 185 N. Y. 497, 78 N. E. 169, 9 L. R. A. (N. S.) 263, 7 Ann. Cas. 348, Mikell Illus. Cas. Criminal Law, 86.

[80] Reg. v. Wade, 1 Car. & K. 739.

[81] State v. Ives, 35 N. C. 338; U. S. v. De Bare, 6 Biss. 358, Fed. Cas. No. 14,935. Contra, Levi v. State, 14 Neb. 1, 14 N. W. 543. And see Reg. v. Reardon, L. R. 1 Cr. Cas. 31; Smith v. State, 59 Ohio St. 350, 52 N. E. 826; 2 Bish. New Cr. Law, § 1140.

[82] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[83] See Anderson v. State, 38 Fla. 3, 20 South. 765.

who receives stolen goods also assisted in the theft does not prevent his punishment for receiving.[84] Some statutes make it a crime to receive not only stolen goods, but goods embezzled or obtained by false pretenses.[85] A wife does not commit the crime by receiving stolen goods from her husband, at least if she receives them directly from him because, in such case, the act being done in his presence is presumed to be done under coercion by him.[86] But there seems no reason in principle why she should not be guilty of the crime if she should receive them in the absence of her husband, or where she receives them through an innocent agent. The husband may commit the crime by receiving from the wife.[87]

The goods must be received into the possession of the recipient, but need not be received into his manual possession.[88] Taking them into his constructive possesion is sufficient.[89] Where stolen goods were delivered, in the defendant's absence, to his wife, who paid 6d. on account, but the amount to be paid was not fixed until the thief and the defendant met and agreed thereon, when the defendant paid the balance, he was held guilty of receiving; the re-

[84] Jenkins v. State, 62 Wis. 49, 21 N. W. 232. See, also, Whiting v. State, 48 Ohio St. 220, 27 N. E. 96.

[85] In Massachusetts, receiving property knowing it to have been stolen is an offense distinct from receiving property knowing it to have been embezzled. Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485.

[86] Reg. v. Brooks, 1 Dears. 184; Reg. v. Wardraper, 8 Cox, Cr. Cas. 284.

[87] REG. v. WOODWARD, 9 Cox, Cr. Cas. 95, Mikell Illus. Cas. Criminal Law, 198.

[88] Reg. v. Smith, 1 Dears. Cr. Cas. 494, 6 Cox, Cr. Cas. 554; Reg. v. Wiley, 14 Cox, Cr. Cas. 412; State v. St. Clair, 17 Iowa, 149; Com. v. Light, 195 Pa. 220, 45 Atl. 933.

[89] Reg. v. Miller, 6 Cox, Cr. Cas. 353 (receipt by servant by command of master).

ceipt, until the thief and the defendant agreed, not being complete.[90] So, also, where one partner, without his copartner's knowledge, receives stolen goods, knowing them to be stolen, and his copartner afterwards, with like knowledge, takes charge of them, both are guilty.[91]

As in case of larceny, and the other crimes which we have discussed in this chapter, so, also, in case of receiving stolen goods, there must be felonious intent. One who receives goods, though knowing them to have been stolen, is not guilty, if his purpose is to return them to the owner, or merely to detect the thief.[92] It is not necessary, however, that the recipient shall reap, or expect to reap, any benefit to himself from the goods. It is sufficient if he merely intends to aid the thief by concealment.[93] In all cases, knowledge at the time the goods are received that they have been stolen is absolutely essential;[94] but knowledge may always be inferred from the circumstances, and is sufficiently

[90] REG. v. WOODWARD, 9 Cox, Cr. Cas. 95, Mikell Illus. Cas. Criminal Law, 198. It was said by Wilde, B., that by ratifying the defendant made the first act of receiving by the wife his act, but it is doubtful whether the decision can be sustained on that ground. Ante, p. 129.

[91] Sanderson v. Com. (Ky.) 12 S. W. 136.

[92] People v. Johnson, 1 Parker, Cr. R. (N. Y.) 564; Arcia v. State, 26 Tex. App. 193, 9 S. W. 685. Otherwise with intent to require a reward for return. Baker v. State, 58 Ark. 513, 25 S. W. 603.

[93] Rex v. Richardson, 6 Car. & P. 335; Com. v. Bean, 117 Mass. 141; State v. Rushing, 69 N. C. 29, 12 Am. Rep. 641. Otherwise under statutes requiring receipt for "gain" of receiver. Aldrich v. People, 101 Ill. 16. In Michigan, and probably in other states, the crime is enlarged to include aiding the thief to conceal the property. People v. Reynolds, 2 Mich. 422. In Iowa it is held not to be necessary to show guilty intent further than to show knowledge that goods were stolen. State v. Smith, 88 Iowa, 1, 55 N. W. 16.

[94] Reg. v. Adams, 1 Fost. & F. 86; Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485; Tolliver v. State, 25 Tex. App. 600, 8 S. W. 806; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505.

shown if the circumstances proven are such as must have made the recipient believe they were stolen.[95]

It has been held that the fact that the goods were stolen in another state is immaterial on the ground that, the original taking being felonious, every act of possession continued under it by the thief is a felonious taking.[96] In England it has been held that the crime of receiving is not committed if the goods were stolen outside the kingdom.[97] In some states there are statutes making it a crime to receive goods brought into the state from another state where they were stolen.

MALICIOUS MISCHIEF

110. Malicious mischief is a misdemeanor at common law, and, though there is much conflict in the authorities, may be generally defined as any willful physical injury to property from ill will or resentment towards the owner, or, as held by some courts, from wantonness, and not animo furandi, as in case of larceny.[98]

There is no doubt that malicious mischief is a common-law crime, except where the common law has been super-

[95] Collins v. State, 33 Ala. 434, 73 Am. Dec. 426; Reg. v. White, 1 Fost. & F. 665; Murio v. State, 31 Tex. Cr. R. 210, 20 S. W. 356. Knowledge, not suspicion. State v. Goldman, 65 N. J. Law, 394, 47 Atl. 641.

[96] Com. v. Andrews, 2 Mass. 14, 3 Am. Dec. 17; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[97] Reg. v. Madge, 9 Car. & P. 29; Reg. v. Carr, 15 Cox, Cr. Cas. 129. Post, p. 490.

[98] State v. Robinson, 20 N. C. 130, 32 Am. Dec. 661. For an exhaustive review of this subject, and the cases, see Benn. & Heard. Cr. Cas. 22 et seq., and monographic note on malicious mischief at common law and by statute in 32 Am. Dec. 662–671.

seded by statute. It has been so superseded in England by statutes protecting almost every conceivable article of property; and this is so, though to much less extent, in this country. There are, however, with us numerous cases recognizing the common-law crime,[99] but they are in irreconcilable conflict. Some of the courts hold that the property must be personal and in most cases it is personal; but Lord Coke states that it is a common-law crime to deface tombs and monuments, though they are real estate;[1] and it has been held a common-law crime to maliciously injure trees,[2] and to tear off and carry away copper attached to the freehold.[3] It has been held that a dog has money value and that a person may therefore be made criminally liable for killing it.[4] Malicious mischief is distinguished from larceny by the absence of the animus furandi essential to that crime. To constitute the crime, malice is essential, but the cases are not in accord as to whether the malice must be directed against the owner or whether it is sufficient if directed against the property injured. It has been said that the injury must be done "either out of a spirit of wanton cruelty or wicked revenge," and that the mere will-

[99] People v. Moody, 5 Parker, Cr. R. (N. Y.) 568; State v. Watts, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216; Respublica v. Teischer, 1 Dall. (Pa.) 335, 1 L. Ed. 163; People v. Smith, 5 Cow. (N. Y.) 258. In State v. Manuel, 72 N. C. 201, 21 Am. Rep. 455, it was held that to maliciously wound an animal, and not kill it, was not indictable at common law; that an indictment would lie for no malicious injury to property short of its destruction, any injury short of this being a mere civil trespass. See, also, State v. Beekman, 27 N. J. Law, 124, 72 Am. Dec. 352, and Reg. v. Wallace, 1 Craw. & D. 403.

[1] 3 Co. Inst. 202.

[2] Com. v. Eckert, 2 Browne (Pa.) 249.

[3] Rex v. Joyner, J. Kel. 29.

[4] Nehr v. State, 35 Neb. 638, 53 N. W. 589, 17 L. R. A. 771; State v. Latham, 35 N. C. 33. Contra, U. S. v. Gideon, 1 Minn. 292 (Gil. 226).

ful infliction of injury is not enough without further proof, to show "malice" as the term is used in the statutes defining "malicious mischief." [5] A person may under some circumstances, be justified in injuring animals, as, for instance, where it is necessary to protect his property; and, if he has ineffectually used ordinary care otherwise to protect his property the injury will not be deemed willful or wanton.[6] Nor can a person be deemed to have acted maliciously where he acted in good faith, under an honest claim of right; as, for instance, when he destroys another's crop, believing in good faith that he owns the land, and intending

[5] Com. v. Walden, 3 Cush. (Mass.) 558, citing 4 Bl. Comm. 244; Garrett v. Greenwell, 92 Mo. 120, 4 S. W. 441; State v. Wilcox, 3 Yerg. (Tenn.) 278, 24 Am. Dec. 569; State v. Robinson, 20 N. C. 130, 32 Am. Dec. 661. Contra, Territory v. Crozier, 6 Dak. 8, 50 N. W. 124. Malice may sometimes be inferred from the nature of the injury, and the manner in which it is inflicted. People v. Burkhardt, 72 Mich. 172, 40 N. W. 240; State v. Williamson, 68 Iowa, 351, 27 N. W. 259; People v. Keeley, 81 Cal. 210, 22 Pac. 593; People v. Olsen, 6 Utah, 284, 22 Pac. 163 (where it was held that the accused need not have known the owner of the property). And see, to same effect, State v. Linde, 54 Iowa, 139, 6 N. W. 168; State v. Phipps, 95 Iowa, 491, 64 N. W. 411. In prosecution for malicious mischief in injuring a house, malice against the owner was not essential, where the purpose was to commit a crime against one who had taken refuge therein. Funderburk v. State, 75 Miss. 20, 21 South. 658. See State v. Gilligan, 23 R. I. 400, 50 Atl. 844.

[6] Wright v. State, 30 Ga. 325, 76 Am. Dec. 656; Farmer v. State, 21 Tex. App. 423, 2 S. W. 767; Woods v. State, 27 Tex. App. 586, 11 S. W. 723; People v. Kane, 131 N. Y. 111, 29 N. E. 1015, 27 Am. St. Rep. 574. Mere trespass by an animal, however, without more, is no excuse for killing it. Snap v. People, 19 Ill. 80, 68 Am. Dec. 582. The accused, owner of a flock of turkeys, found a dog running back and forth in the street, outside the inclosure in which the turkeys were confined, barking and snapping at the turkeys inside, and frightening them. The accused thereupon killed the dog. It was held that accused was guilty of "willfully killing a useful animal," as the killing was not necessary to prevent the destruction of the turkeys. State v. Smith, 156 N. C. 628, 72 S. E. 321, 36 L. R. A. (N. S.) 910.

to plant a crop for himself; for, as said in an Indiana case, the machinery of the criminal law is not to be set in motion to redress merely private grievances, or to settle questions of property, where honest differences of opinion are involved.[7]

FORGERY

111. Forgery, at common law, is the fraudulent making or alteration of a writing to the prejudice of another man's right.[8]

112. To constitute the crime

(a) The making or alteration must be false.

(b) It must be with intent to defraud.

(c) The instrument, as made or altered, must be of apparent legal efficacy to impose a liability, or, in case of alteration, to change a liability.

(d) The alteration must therefore be material.

113. Forgery is a misdemeanor at common law, but is very generally made a felony by statute.[9]

The Making

The instrument may be written with pen or pencil,[10] or it may be wholly printed or engraved, as in case of a railroad or theater ticket.[11] The crime may be committed by

[7] Barlow v. State, 120 Ind. 56, 22 N. E. 88; Woodward v. State, 33 Tex. Cr. R. 554, 28 S. W. 204; State v. Foote, 71 Conn. 737, 43 Atl. 488. But see Heron v. State, 22 Fla. 86.

[8] 4 Bl. Comm. 247. "Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 2 Bish. New Cr. Law, § 523.

[9] 2 Bish. New Cr. Law, § 609.

[10] Baysinger v. State, 77 Ala. 63, 54 Am. Rep. 46.

[11] Com. v. Ray, 3 Gray (Mass.) 446; In re Benson (C. C.) 84 Fed. 649.

writing or printing matter over another's genuine signature, as well as by signing another's name.[12] Making another's mark, instead of signing his name, may be a forgery.[13] The crime may also be committed by signing one's own name in such a way as to make the writing purport to be by another person of the same or a similar name,[14] or by signing the name of a fictitious[15] or deceased person,[16] or person without legal capacity,[17] as the name of such person. It is not forgery for one to sign a fictitious name if he signs it as his own, and the person injured thereby relied upon and gave credit to the person himself.[18] Where, however,

[12] Caulkins v. Whisler, 29 Iowa, 495, 4 Am. Rep. 236; Roberts v. State, 92 Ga. 451, 17 S. E. 262.

[13] Rex v. Dunn, 2 East, P. C. 962. There may be forgery, though place for mark left blank. Lemasters v. State, 95 Ind. 367.

[14] Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; People v. Peacock, 6 Cow. (N. Y.) 72; Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49; U. S. v. Long (C. C.) 30 Fed. 678; State v. Farrell, 82 Iowa, 553, 48 N. W. 940; People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

[15] Rex v. Lockett, 1 Leach, 110; Sasser v. State, 13 Ohio, 453; People v. Davis, 21 Wend. (N. Y.) 309; State v. Wheeler, 20 Or. 192, 25 Pac. 394, 10 L. R. A. 779, 23 Am. St. Rep. 119; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 760; People v. Warner, 104 Mich. 337, 62 N. W. 405. When name fictitious, Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

[16] Henderson v. State, 14 Tex. 503; Billings v. State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 760. Name of corporation no longer in existence, Buckland v. Com., 8 Leigh (Va.) 734; White v. Com., 4 Bin. (Pa.) 418.

[17] Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 760; People v. Krummer, 4 Parker, Cr. R. (N. Y.) 217; King v. State, 42 Tex. Cr. R. 108, 57 S. W. 840, 96 Am. St. Rep. 792.

[18] "If a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit thus being given to himself without any regard to the name or without any relation to a third person." Cockburn, C. J., in Reg. v. Martin, 14 Cox, Cr. Cas. 375, 5 Q. B. Div. 34.

the credit is given, not in reliance on the accused himself, but on the genuineness of the instrument, it is forgery.[19] Signing one's own name as agent of another without authority, or signing another's name with an addition showing that it is signed by accused as agent,[20] is not forgery, since the making or alteration must be false, and this is a mere assumption of authority. Hence it has been held not forgery for a person falsely to sign his own name and the name of another as a pretended partnership.[21] Signing by making an impression with a stamp is such a signature as may constitute the crime.[22] There must be some making or alteration of an instrument, and therefore it would not be forgery to make use of an instrument, such as an order for the payment of money, or a check, which is genuine, but by mistake is drawn for more money than is intended.[23] So, also, it has been held not to be forgery to fraudulently write out

[19] State v. Wheeler, 20 Or. 192, 25 Pac. 394, 10 L. R. A. 779, 23 Am. St. Rep. 119.

[20] Reg. v. White, 2 Cox, Cr. Cas. 210; State v. Willson, 28 Minn. 52, 9 N. W. 28; In re Tully (C. C.) 20 Fed. 812; State v. Taylor, 46 La. Ann. 1332, 16 South. 190, 25 L. R. A. 591, 49 Am. St. Rep. 351. Where a bounty inspector made a bounty certificate, certifying that a third person had exhibited skins to him and filed the necessary affidavits, both of which facts were false and known to be false by the inspector, he was held guilty of forgery under a statute providing that any person who shall falsely make a certificate relating to bounties on wild animals shall be guilty of forgery. In re Terrett, 34 Mont. 325, 86 Pac. 266 (1906). Other states contra, construing the "falsely making" in similar statutes as having reference, not to the contents of the instrument, but as to its genuineness, the falsity consisting in its purporting to be the instrument of some person other than the one actually signing. Com. v. Foster, 114 Mass. 319, 19 Am. Rep. 353 (1873) State v. Young, 46 N. H. 266, 88 Am. Dec. 212 (1865); U. S. v. Moore (D. C.) 60 Fed. 738 (1894).

[21] 1 Hawk. P. C. c. 70, § 5; COM. v. BALDWIN, 11 Gray (Mass.) 197, 71 Am. Dec. 703, Mikell Illus. Cas. Criminal Law, 203.

[22] In re Benson (C. C.) 34 Fed. 649.

[23] Bell v. State, 21 Tex. App. 270, 17 S. W. 155.

a note or deed for an illiterate person for more than he intends, and then, by falsely reading it over to him, obtain his signature.[24] On the same principle it is not forgery to alter a receipt which has been read to the prosecutor and procure his signature thereto in ignorance of the alteration.[25] A person may be authorized to sign another's name, or fill in blanks over his signature, and yet may do so fraudulently, so as to be guilty of forgery; as, for instance, where a person authorized to sign another's name to certificates signs a false certificate,[26] or where a person who is authorized to fill up checks signed in blank, and use them in his principal's business for a particular purpose, fills them up for an arbitrary amount, and appropriates it.[27] In the latter case it would not be forgery if the agent had a general authority to fill up the checks, but would be embezzlement.[28] The fact that the forged instrument does not resemble the genuine, provided the instrument can reasonably deceive, is immaterial except so far as the fact of dissimilarity may bear on the question of intent.[29] A person who directs the forging of an instrument by an innocent agent, and utters

[24] Wells v. State, 89 Ga. 788, 15 S. E. 679; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; COM. v. SANKEY, 22 Pa. 390, 60 Am. Dec. 91, Mikell Illus. Cas. Criminal Law, 206. But see State v. Shurtliff, 18 Me. 368; Clay v. Schwab, 1 Mich. N. P. 168.

[25] Reg. v. Chadwick, 2 Moody & R. 545.

[26] Moore v. Com., 92 Ky. 630, 18 S. W. 833.

[27] Reg. v. Hart, 7 Car. & P. 652; Hooper v. State, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; People v. Dickie, 62 Hun, 400, 17 N. Y. Supp. 51. And see State v. Maxwell, 47 Iowa, 454; Biles v. Com., 32 Pa. 529, 75 Am. Dec. 568; State v. Kroeger, 47 Mo. 552; State v. Flanders, 38 N. H. 324.

[28] Reg. v. Richardson, 2 Fost. & F. 343; People v. Reinitz (Gen. Sess.) 6 N. Y. Supp. 672.

[29] Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154; State v. Gryder, 44 La. Ann. 962, 11 South. 573, 32 Am. St. Rep. 358; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767.

the same, and receives the proceeds, is a principal forger.[80] Thus forgery may be committed by procuring an instrument to be signed by another with that other's own name, if it is done for the purpose of using it as the signature of another person of the same name as the signer.[81]

Character of Instrument

According to the weight of authority the subject of a forgery must be some writing or document, but beyond this the character of the instrument is not material, provided that, if genuine, it might be of apparent legal efficacy and might prejudice another's rights. The subject of forgery may be a deed [82] or a mortgage,[83] a check or note or bill of exchange,[84] an order for goods or money,[85] a duebill,[86] a

[80] Territory v. Barth, 2 Ariz. 319, 15 Pac. 673; Elmore v. State, 92 Ala. 51, 9 South. 600; Hughes v. Com., 89 Ky. 227, 12 S. W. 269; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774.

[81] Reg. v. Mitchell, 1 Denison Cr. Cas. 282, note.

[82] Allgood v. State, 87 Ga. 668, 13 S. E. 560.

[83] People v. Sharp, 53 Mich. 523, 19 N. W. 168.

[84] Rex v. Birkett, Russ. & R. 86; Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154; Butler v. Com., 12 Serg. & R. (Pa.) 237, 14 Am. Dec. 679; State v. Coyle, 41 Wis. 267; Com. v. Ward, 2 Mass. 397.

[85] Stewart v. State, 113 Ind. 505, 16 N. E. 186; Hendricks v. State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; Rollins v. State, 22 Tex. App. 548, 3 S. W. 759, 58 Am. St. Rep. 659; Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766; Reddick v. State, 31 Tex. Cr. R. 587, 21 S. W. 684; State v. Jefferson, 39 La. Ann. 331, 1 South. 669; State v. Stephen, 45 La. Ann. 702, 12 South. 883; Smith v. State, 29 Fla. 408, 10 South. 894; Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 488; Baysinger v. State, 77 Ala. 63, 54 Am. Rep. 46. The fact that order is signed at beginning is immaterial. Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766. Failure to name drawee and payee immaterial. State v. Bauman, 52 Iowa, 68, 2 N. W. 956.

[86] Nelson v. State, 82 Ala. 44, 2 South. 463.

recommendation,[37] a testimonial of good character,[38] entries in account books,[39] receipts,[40] settlements,[41] a diploma,[42] an examination certificate,[43] and the like. It is not forgery for one seller of goods to imitate the labels of another,[44] nor for a person to falsely paint the name of a well-known artist in the corner of a picture, so as to make it appear to have been painted by him.[45] In the latter case, Cockburn, C. J., said: "If you once go beyond a writing, where are you to stop? Could there be a forgery of sculpture? * * * A forgery must be of some document or writing."

[37] Reg. v. Sharman, Dears. Crown Cas. 285; Ames' Case, 2 Greenl. (Me.) 365; Com. v. Coe, 115 Mass. 481. Contra, Waterman v. People, 67 Ill. 91 (false letter of introduction to hospital). A letter directed to "any employé of the Western Union Telegraph Company," stating that X. was a personal friend of the management, and any favors shown him would be duly appreciated," is the subject of forgery. People v. Abeel, 45 Misc. Rep. 86, 91 N. Y. Supp. 699.

[38] Reg. v. Toshack, 1 Denison, Cr. Cas. 492.

[39] Biles v. Com., 32 Pa. 529, 75 Am. Dec. 568; In re Tully (C. C.) 20 Fed. 812. Entry in bank pass book, Reg. v. Smith, Leigh & C. 168. False charge in one's own account books not forgery. State v. Young, 46 N. H. 266, 88 Am. Dec. 212.

[40] Snell v. State, 2 Humph. (Tenn.) 347; State v. Floyd, 5 Strob. (S. C.) 58, 53 Am. Dec. 689; State v. Smith, 46 La. Ann. 1433, 16 South. 372. Indorsement of receipt on back of note, State v. Davis, 53 Iowa, 252, 5 N. W. 149. Not forgery to erase acquittance indorsed on bond. State v. Thornburg, 28 N. C. 79, 44 Am. Dec. 67.

[41] Settlement of book account, Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

[42] Reg. v. Hodgson, 7 Cox, Cr. Cas. 122.

[43] Reg. v. Toshack, 1 Denison, Cr. Cas. 492.

[44] REG. v. SMITH, 8 Cox, Cr. Cas. 32, Mikell Illus. Cas. Criminal Law, 207. See White v. Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

[45] Reg. v. Closs, 7 Cox, Cr. Cas. 494.

Legal Efficacy of Instrument

The instrument must be of apparent legal efficacy,[46] since otherwise it has no legal tendency to defraud. If an instrument does not appear on its face to be of legal efficacy, it cannot be punished as a forgery without proof of extrinsic facts to show that, if genuine, it would have such efficacy. Making a writing which is invalid on its face, as in case of a will not signed by the requisite number of witnesses,[47] or writing the name of a witness on a paper not required to be witnessed,[48] is not forgery. Nor is it forgery to counterfeit a bank note which the statute declares void, as no one could be defrauded, all persons being presumed to know the law.[49]

It is on this ground of legal efficacy that it has been held not to be forgery to counterfeit labels used by another in wrapping goods.[50] As said by Bramwell, B., in the case last cited: "Forgery presupposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of

[46] Com. v. Hinds, 101 Mass. 209; People v. Shall, 9 Cow. (N. Y.) 778; People v. Drayton, 168 N. Y. 10, 60 N. E. 1048. Cases holding a letter of recommendation or testimonial of good character (see notes 37, 38) subjects of forgery are, to say the least, extreme cases.

[47] Rex v. Wall, 2 East, P. C. 953; State v. Smith, 8 Yerg. (Tenn.) 150.

[48] State v. Gherkin, 29 N. C. 206.

[49] 2 Bish. New Cr. Law, § 538. Bond not executed in conformity with statute. Cunningham v. People, 4 Hun (N. Y.) 455. Instrument prohibited under penalty not void, and may be subject of forgery. Nelson v. State, 82 Ala. 44, 2 South. 463. See, also, Thompson v. State, 9 Ohio St. 354; Butler v. Com., 12 Serg. & R. (Pa.) 237, 14 Am. Dec. 679; Brown v. People, 8 Hun (N. Y.) 562. But see, contra, Gutchins v. People, 21 Ill. 642.

[50] REG. v. SMITH, 8 Cox, Cr. Cas. 32, Mikell Illus. Cas. Criminal Law, 207.

these documents is as good as the other—the one asserts what the other does; the one is as true as the other, but the one is improperly used. * * * I cannot see any false character in the document."

If, however, an instrument is valid on its face, and is rendered invalid only because of extrinsic facts, it may be the subject of forgery, as people are not presumed to know the facts.[51] Thus forgery may be committed by signing the name of a fictitious person, or of a deceased person, or of a person without legal capacity.[52] On the other hand, although an instrument does not, on its face, appear to be of legal efficacy, it may yet be shown to be a forgery by averment in the indictment and proof of such extrinsic facts as may show that, if it were genuine, it would possess legal efficacy.[53] To make or alter a note which on its face appears to be, or to alter a note that is, barred by the statute of limitations, would be a forgery, as the maker of a note is not bound to plead the statute; and, in the absence of such a plea, a judgment could be rendered against him.[54]

[51] People v. Galloway, 17 Wend. (N. Y.) 540; State v. Hilton, 35 Kan. 338, 11 Pac. 164; State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158. Insurance premium note to be valid when policy issued, policy not issued, State v. McMackin, 70 Iowa, 281, 30 N. W. 635. Usurious bill of exchange, People v. Wheeler, 47 Hun (N. Y.) 484.

[52] Ante, p. 386.

[53] Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; Com. v. Ray, 3 Gray (Mass.) 441; State v. Wheeler, 19 Minn. 98 (Gil. 70).

[54] State v. Dunn, 23 Or. 562, 32 Pac. 621, 37 Am. St. Rep. 704. Other cases, not forgery. Contract invalid for want of consideration, People v. Shall, 9 Cow. (N. Y.) 778; married woman's deed void for want of acknowledgment, Roode v. State, 5 Neb. 174, 25 Am. Rep. 475; note appearing on its face not to be executed by person represented, Rudicel v. State, 111 Ind. 595, 13 N. E. 114; mistake in name intended to be signed, People v. Elliott, 90 Cal. 586, 27 Pac. 433; but forgery where name is misspelled, State v. Covington, 94 N. C. 913, 55 Am. Rep. 650. Unintelligible writing not forgery, Ter-

Alterations and Erasures

Forgery may be committed by making alterations or erasures in an instrument, as well as by the making of the instrument itself. But not all alterations or erasures are forgery. To be forgery the alterations must be material, for otherwise they cannot be prejudicial.[55] Erasures may be forgeries, but not erasures of immaterial matter. Nor is it forgery to add immaterial matter, such, for instance, as words which, if absent, would be implied by law,[56] or to add the name of a witness to a paper to which witnesses are not

ry v. Com., 87 Va. 672, 13 S. E. 104; otherwise where orthography merely bad, Williams v. State, 24 Tex. App. 342, 6 S. W. 531; or penmanship bad, Hagar v. State, 71 Ga. 164. Failure of a forged ticket to express consideration or promise is immaterial. In re Benson (C. C.) 34 Fed. 649. Affidavits not required by law not forgery. U. S. v. Barnhart (D. C.) 33 Fed. 459. Making false tax receipts, where taxes have in fact been paid, not forgery, Cox v. State, 66 Miss. 14, 5 South. 618; nor in case of void city warrants, Raymond v. People, 2 Colo. App. 329, 30 Pac. 504; nor contract for purchase of goods, providing for future delivery and payment, Shirk v. People, 121 Ill. 61, 11 N. E. 888.

[55] Immaterial alteration of receipt, State v. Dorrance, 86 Iowa, 428, 53 N. W. 281; State v. Riebe, 27 Minn. 315, 7 N. W. 262; of note, State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282; alteration by drawer of satisfied and returned order for goods, People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; unsigned indorsement of money received, on back of note, State v. Davis, 53 Iowa, 252, 5 N. W. 149. It was held forgery to alter satisfied mortgage, State v. Adamson, 43 Minn. 196, 45 N. W. 152; instrument signed in blank, State v. Kroeger, 47 Mo. 552. Under a statute providing that where the sum payable in a check is expressed both in words and in figures, and there is a discrepancy between the two, the sum expressed by the words is that payable, where a check recited in words that the sum payable was "twenty-five hundred and no/100 dollars," and the sum in figures was "$25/00," the alteration of the figures so as to read "$2500/00," was not forgery, since the alteration did not change the legal effect of the instrument. People v. Lewinger, 252 Ill. 332, 96 N. E. 837, Ann. Cas. 1912D, 239.

[56] Hunt v. Adams, 6 Mass. 519.

required.[57] Examples of forgery by alteration are where the date,[58] or amount, or place of payment [59] of a note is changed, or signatures are erased and substituted,[60] or where the condition of a note is torn off, so as to render it negotiable.[61] Altering one's own note after it has been delivered may be a forgery.[62] Of course, it is not forgery to alter an instrument which is not the subject of forgery, and therefore what has been said in the preceding sections is also applicable here.

Intent

Fraudulent intent is essential to constitute this crime.[63] It is no forgery for one carelessly to write another's name without any purpose, or to insert in a contract which has been signed, a provision which he understands the other party to have agreed to.[64] On the other hand, if a fraudulent intent is shown, it is no defense that, as in case of a note, the accused intended to take up the instrument him-

[57] State v. Gherkin, 29 N. C. 206.

[58] State v. Kattlemann, 35 Mo. 105; Allen v. State, 79 Ala. 34.

[59] Rex v. Treble, Russ. & R. 164, 2 Taunt. 328; White v. Hass, 32 Ala. 430, 70 Am. Dec. 548.

[60] Rex v. Treble, 2 Taunt. 328; State v. Robinson, 16 N. J. Law, 507. Indorsement on note, Powell v. Com., 11 Grat. (Va.) 822; Com. v. Welch, 148 Mass. 296, 19 N. E. 357; State v. Davis, 53 Iowa, 252, 5 N. W. 149; Pennsylvania v. Misner, Add. (Pa.) 44. Change of middle initial. State v. Higgins, 60 Minn. 1, 61 N. W. 816, 27 L. R. A. 74, 51 Am. St. Rep. 490.

[61] State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282.

[62] State v. Young, 46 N. H. 266, 88 Am. Dec. 212; Com. v. Mycall, 2 Mass. 136.

[63] Com. v. Connolly, 11 Pa. Co. Ct. R. 414.

[64] Pauli v. Com., 89 Pa. 432. Signing name of witness to fee bill in belief witness had agreed to give him fee. Kotter v. People, 150 Ill. 441, 37 N. E. 932.

self before it became due, and so prevent injury.[65] Nor is it any defense, on a prosecution for forgery by a creditor on his debtor, to show that defendant intended to devote the money obtained thereby to the payment of the debt.[66] It is not necessary that the forger shall intend to reap the advantage from the forgery himself, but one may commit a forgery for the benefit of another.[67] A general intent to defraud is sufficient to render a person guilty; there need be no intent to defraud any particular person.[68] Nor is it necessary that the forgery shall be successful, and actually defraud.[69] Thus a check may be a forgery, though the person whose name is signed to it has no account with the bank on which it is drawn.[70]

[65] Reg. v. Geach, 9 Car. & P. 499; Reg. v. Birkett, Russ. & R. 86; Com. v. Henry, 118 Mass. 460.

[66] Reg. v. Wilson, 2 Car. & K. 527; Claiborne v. State, 51 Ark. 88, 9 S. W. 851.

[67] State v. Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

[68] Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; Barnes v. Com., 101 Ky. 556, 41 S. W. 772. It is held by some courts that the indictment must allege an intent to defraud some particular person. Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601; Williams v. State, 51 Ga. 535. "In order to find the intent to defraud a particular person, it is not necessary that there should be evidence that the accused had that particular person in contemplation at the time of the forgery." Speer, J., in U. S. v. Long (C. C.) 30 Fed. 678.

[69] Com. v. Ladd, 15 Mass. 526; Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 488; State v. McMackin, 70 Iowa, 281, 30 N. W. 635; State v. Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; Hawkins v. State, 28 Fla. 363, 9 South. 652; State v. Washington, 1 Bay (S. C.) 120, 1 Am. Dec. 601; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477. Nonacceptance of forged order is immaterial. Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766.

[70] Com. v. Russell, 156 Mass. 196, 30 N. E. 763.

UTTERING FORGED INSTRUMENT

114. To utter a forged instrument is to offer it, directly or indirectly, by words or actions, as good. This, if done with intent to defraud, and with knowledge of the falsity of the instrument, being an attempt to cheat, is a misdemeanor at common law.[71]

Uttering is in the nature of an attempt to cheat by means of a forged instrument. To constitute the crime of uttering, there must be, not merely intent to defraud, but knowledge that the instrument is a forgery.[72] The forgery is uttered when there is an attempt to make use of it. It is not necessary that there be anything more than the declaration that the instrument is good; it need not be actually accepted and passed.[73] Mere exhibition of the forgery may be enough, as by producing a forged receipt for inspection, in order to lead the person to whom it is produced to believe that the other has paid, and to gain credit.[74] Thus, to offer

[71] 1 Whart. Cr. Law, §§ 703, 713; Com. v. Searle, 2 Bin. (Pa.) 332, 4 Am. Dec. 446; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Wash v. Com., 16 Grat. (Va.) 530.

[72] State v. Warren, 109 Mo. 430, 19 S. W. 191, 32 Am. St. Rep. 681; Elsey v. State, 47 Ark. 572, 2 S. W. 337. A representation made by a person in negotiating a forged note that he is the payee of the note is sufficient to justify the inference that he knew the note to be forged. State v. Williams, 66 Iowa, 573, 24 N. W. 52; State v. Beasley, 84 Iowa, 83, 50 N. W. 570.

[73] People v. Caton, 25 Mich. 392.

[74] Reg. v. Radford, 1 Denison, Cr. Cas. 59; Reg. v. Ion, 2 Denison, Cr. Cas. 475 (forged receipt exhibited by proposed surety to establish his credit). Exhibiting or delivering to an accomplice in order that he may make use of it is not uttering. Reg. v. Heywood, 2 Car. & K. 352. Pledging forged instrument held an uttering. Thurmond v. State, 25 Tex. App. 366, 8 S. W. 473. Recording forged discharge of mortgage an uttering, as "an acquittance and discharge for mon-

to pass a forged check has been held to be an uttering thereof, though it was not only not accepted, but was payable to the order of a third person, and had not been indorsed.[75] There must, however, be some attempt to cheat or offer of the instrument. It is not at common law a crime to have a forged note in one's possession with intent to pass it, though there are statutes now in the different states changing the common law in this respect. The representation that the instrument is good need not necessarily be in words. A mere silent offer of an instrument, knowing that it is forged, is a representation that it is genuine.[76] A person in one county or state is guilty of uttering a forged instrument in another county or state if he procures it to be taken into the latter by an innocent agent, and there collected or passed.[77] And placing a forgery in the mail for transmission to another jurisdiction is uttering.[78]

Uttering and forgery are not different degrees of the same offense, but are distinct offenses; although in some states by statute uttering is declared to be forgery.

ey." People v. Swetland, 77 Mich. 53, 43 N. W. 779. Aiding in obtaining probate of forged will an uttering. Corbett v. State, 5 Ohio Cir. Ct. R. 155. Presenting forged deed for record. Espalla v. State, 108 Ala. 38, 19 South. 82.

[75] Smith v. State, 20 Neb. 284, 29 N. W. 923, 57 Am. Rep. 832.

[76] U. S. v. Long (C. C.) 30 Fed. 678; State v. Calkins, 73 Iowa, 128, 34 N. W. 777.

[77] Reg. v. Taylor, 4 Fost. & F. 511.

[78] Reg. v. Finkelstein, 16 Cox, Cr. Cas. 107.

CHAPTER XII

OFFENSES AGAINST THE PUBLIC HEALTH, SAFETY, COMFORT, AND MORALS

115. Nuisance in General.
116–117. Bigamy or Polygamy.
118–119. Adultery.
120–121. Fornication.
122. Lewdness and Illicit Cohabitation.
123. Incest.
124. Miscegenation.
125–127. Sodomy, Bestiality, and Buggery.
128. Seduction.
129–131. Abortion.

NUISANCE IN GENERAL

115. A common or public nuisance, which is a misdemeanor at common law, is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals, of the citizens at large, resulting either

(a) From an act not warranted by law, or

(b) From neglect of a duty imposed by law.

To constitute a public nuisance, the condition of things must be such as injuriously affects the community at large, and not merely one or even a very few individuals. To take an illustration already used, it is not a public nuisance to maintain a filthy pond, or to dam up and render stagnant the waters of a creek, in the country, where the odors can reach a single neighbor or a few neighbors only, as his or their health and comfort only are affected; but it is other-

wise if it be maintained in a thickly-settled community, or near a public highway.[1]

Whatever tends to endanger life, or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort—is generally, at common law, a public nuisance, and a crime. Thus, it is a public nuisance to set spring guns in such a way as to endanger the lives of persons passing along a highway;[2] to manufacture or keep gunpowder in a settled locality in such a way as to endanger life;[3] to sell or expose for sale putrid, diseased, or unwholesome food;[4] running railroad trains across a highway in a reckless man-

[1] 4 Bl. Comm. 166; COM. v. WEBB, 6 Rand. (Va.) 726, Mikell Illus. Cas. Criminal Law, 1; State v. Close, 35 Iowa, 570; People v. Townsend, 3 Hill (N. Y.) 479; Douglass v. State, 4 Wis. 387; Stoughton v. State, 5 Wis. 291; State v. Gainer, 3 Humph. (Tenn.) 39; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Neal v. Henry, Meigs (Tenn.) 17, 33 Am. Dec. 125; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; State v. Wolf, 112 N. C. 889, 17 S. E. 528.

[2] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[3] Anon., 12 Mod. 342; Bradley v. People, 56 Barb. (N. Y.) 72; Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734. It has been held that it is not a crime unless the powder is negligently kept. People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296. This is too broad a statement, however, for in all cases the danger to the public is the test, and not the intent or the action of the accused, except as bearing on the question of danger. Myers v. Malcolm, 6 Hill (N. Y.) 292, 41 Am. Dec. 744; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; PEOPLE v. DETROIT WHITE LEAD WORKS, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722, Mikell Illus. Cas. Criminal Law, 215.

[4] 4 Bl. Comm. 162; Rex v. Dixon, 3 Maule & S. 11; Goodrich v. People, 19 N. Y. 574, affirming 3 Parker, Cr. R. (N. Y.) 622; State v. Norton, 24 N. C. 40; Hunter v. State, 1 Head (Tenn.) 160, 73 Am. Dec. 164; State v. Snyder, 44 Mo. App. 429.

ner;[5] to pollute drinking water;[6] to expose either a live person or a corpse or a beast that is infected with a contagious disease;[7] to disturb public rest on Sunday;[8] to exhibit disgusting or indecent books or pictures;[9] to maintain an offensive trade or industry, such as a tannery, distillery, or slaughter house, in a populous community.[10] There are also nuisances in personal deportment, such as common

[5] Louisville, C. & L. R. Co. v. Com., 80 Ky. 143, 44 Am. Rep. 468.

[6] State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; State v. Taylor, 29 Ind. 517.

[7] Rex v. Burnett, 4 Maule & S. 272; REX v. VANTANDILLO, 4 Maule & S. 73, Mikell Illus. Cas. Criminal Law, 213.

[8] Parker v. State, 16 Lea (Tenn.) 476, 1 S. W. 202. Keeping shop open on Sunday not a nuisance. State v. Lorry, 7 Baxt. (Tenn.) 95, 32 Am. Rep. 555. Contra, Com. v. Jacobus, 1 Leg. Gaz. R. (Pa.) 491; Phillips v. Innes, 4 Clark & F. 234. See note in 32 Am. Rep. 557. Playing baseball on Sunday at an isolated place not a nuisance. Com. v. Meyers (Pa. Com. Pl.) 8 Pa. Co. Ct. R. 435. Interrupting a speaker at a political meeting by asking him questions, and refusing to cease such interruptions when requested to do so by the chairman, is a "willful disturbance of a public assembly." People v. Malone, 156 App. Div. 10, 141 N. Y. Supp. 149.

[9] Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; Reg. v. Grey, 4 Fost. & F. 73. Under statutes declaratory of common law, Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652; People v. Muller, 96 N. Y. 408, 48 Am. Rep. 635.

[10] Rex v. Cross, 2 Car. & P. 483; Com. v. Upton, 6 Gray (Mass.) 473; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; State v. Kaster, 35 Iowa, 221; State v. Neidt (N. J.) 19 Atl. 318; Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170; PEOPLE v. DETROIT WHITE LEAD WORKS, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722, Mikell Illus. Cas. Criminal Law, 215. Coal shed, noise and coal dust, Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. Rep. 673. It is not necessary that the smell be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable. Rex v. White, 1 Burrows, 333; Catlin v. Valentine, 9 Paige (N. Y.) 575, 38 Am. Dec. 567; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Gay v. State, 90 Tenn. 645, 18 S. W. 260, 25 Am. St. Rep. 707.

brawlers, common scolds,[11] common barrators,[12] open and notorious drunkenness,[13] indecent and public exposure of the person, or open and notorious lewdness,[14] eavesdropping,[15] and profane language, ribald songs, and blasphemy.[16] Disorderly houses, including houses of ill fame and drinking or tippling houses, kept in such a way as to annoy and scandalize the public, are nuisances at common law,[17] though now they are very generally regulated by

[11] 4 Bl. Comm. 168; James v. Com., 12 Serg. & R. (Pa.) 220; Com. v. Mohn, 52 Pa. 243, 91 Am. Dec. 153.

[12] Post, p. 432.

[13] State v. Waller, 7 N. C. 229. Private drunkenness not a crime. State v. Locker, 50 N. J. Law, 512, 14 Atl. 749; Hutchinson v. State, 5 Humph. (Tenn.) 142.

[14] Reg. v. Farrell, 9 Cox, Cr. Cas. 446; Grisham v. State, 2 Yerg. (Tenn.) 589; Knowles v. State, 3 Day (Conn.) 103, 108; State v. Rose, 32 Mo. 560; State v. Roper, 18 N. C. 208. Indecent exposure by a man to one woman only has been held "open and gross lewdness and lascivious behavior," within meaning of statute, for which an indictment will lie. State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; Fowler v. State, 5 Day (Conn.) 81. Contra, doubtless, at common law. Reg. v. Watson, 2 Cox, Cr. Cas. 276; Reg. v. Webb, 1 Denison, Cr. Cas. 338. Indecent exposure in public place need not be actually seen. It is enough if persons were present and might have seen it. Van Houten v. State, 46 N. J. Law, 16, 50 Am. Rep. 397; Reg. v. Holmes, 6 Cox, Cr. Cas. 216.

[15] 4 Bl. Comm. 168; State v. Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771; State v. Williams, 2 Overt. (Tenn.) 108.

[16] State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; State v. Powell, 70 N. C. 67; State v. Toole, 106 N. C. 736, 11 S. E. 168; BELL v. STATE, 1 Swan (Tenn.) 42, Mikell Illus. Cas. Criminal Law, 211; State v. Graham, 3 Sneed (Tenn.) 134; Com. v. Linn, 158 Pa. 22, 27 Atl. 843, 22 L. R. A. 353. Single act of profanity not enough. Gaines v. State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64.

[17] State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; State v. Haines, 30 Me. 65; King v. People, 83 N. Y. 587; Thatcher v. State, 48 Ark. 60, 2 S. W. 343; Price v. State, 96 Ala. 1, 11 South. 128. Barroom and dance hall, Beard v. State, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536.

statute. Private gambling is not a nuisance at common law, but a gambling house becomes so if it is conducted openly and notoriously.[18] In most, if not all, the states, there are particular statutes covering the subject and prohibiting gaming. Obstructing a public highway is a nuisance,[19] and

[18] Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; Com. v. Tilton, 8 Metc. (Mass.) 232; Com. v. Stahl, 7 Allen (Mass.) 305; People v. Jackson, 3 Denio (N. Y.) 101, 45 Am. Dec. 449; Bloomhuff v. State, 8 Blackf. (Ind.) 205; State v. Crummey, 17 Minn. 72 (Gil. 50). Place where public may bet on horse racing held a common nuisance at common law. McClean v. State, 49 N. J. Law, 471, 9 Atl. 681; Haring v. State, 51 N. J. Law, 386, 17 Atl. 1079. Stock gambling house a disorderly house. Kneffler v. Com., 94 Ky. 359, 22 S. W. 446. A "suit club," whose members pay to a tailor one dollar a week, and which holds weekly drawings, as a result of which the member holding the lucky number receives from the tailor a suit of clothes, and then ceases to be a member of the club, is a scheme in the nature of a lottery; and this, though the member who continues to pay his one dollar weekly for thirty weeks is entitled to a thirty dollar suit of clothes regardless of the result of the drawings. De Florin v. State, 121 Ga. 593, 49 S. E. 699, 104 Am. St. Rep. 177.

[19] Hall's Case, 1 Vent. 169; People v. Cunningham, 1 Denio (N. Y.) 524, 43 Am. Dec. 709; Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123. Even a public officer may be indicted for obstructing a highway; as, for instance, where a constable blocks up the sidewalk with goods which he is selling at public auction. Com. v. Milliman, 13 Serg. & R. (Pa.) 403. It is not a nuisance for a merchant to temporarily obstruct the sidewalk in receiving or sending out goods, or for a person to place building materials in the street while he is building a house, but the street must be used in a reasonable manner, so as to cause as little inconvenience to the public as possible. Com. v. Passmore, 1 Serg. & R. (Pa.) 219. Unreasonable obstructions, Cohen v. City of New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506. Running traction engine to and fro on highway a nuisance. Com. v. Allen, 148 Pa. 358, 23 Atl. 1115, 16 L. R. A. 148, 33 Am. St. Rep. 830. Bill board on sidewalk a nuisance. City of Wilkes Barre v. Burgunder (Pa. Com. Pl.) 7 Kulp. 63. Display of fireworks in street in a dangerous way a nuisance. Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664. Obstructing alley in rear of store not a nuisance.

this includes navigable rivers, which are considered highways.[20]

As was stated in the black-letter text, a nuisance may be caused by an omission to perform a legal duty.[21] Such is the case where a person charged with the duty of repairing a highway neglects to do so.[22] The intent of the person maintaining a nuisance which is dangerous or offensive to the public is entirely immaterial. If he causes or suffers the nuisance, and the public is so prejudiced, the offense is complete; for every man is presumed to intend the natural and probable consequences of his acts.[23]

Justification

It is, as a rule, no justification that the public is benefited as well as injured by the thing alleged to be a nuisance; as

Bagley v. People, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192; Beecher v. People, 38 Mich. 289, 31 Am. Rep. 316. Bay window projecting over sidewalk held a public nuisance. Reimer's Appeal, 100 Pa. 182, 45 Am. Rep. 373. Private bridge across street a public nuisance, though high enough for passage under it. Bybee v. State, 94 Ind. 443, 48 Am. Rep. 175. Turnpike a public highway. Com. v. Wilkinson, 16 Pick. (Mass.) 175, 26 Am. Dec. 654. For criminal liability of corporations, see ante, p. 82. Continuing obstruction erected by others is indictable. State v. Hunter, 27 N. C. 369, 44 Am. Dec. 41.

[20] Reg. v. Stephens, L. R. 1 Q. B. 702; Hart v. Mayor, etc., of City of Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Stump v. McNairy, 5 Humph. (Tenn.) 363, 42 Am. Dec. 437; State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618.

[21] Municipal corporation indictable for neglect to remove a nuisance which it has power to remove. People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95. And see State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586. As to liability of corporations generally, see ante, pp. 82–86.

[22] 4 Bl. Comm. 167; People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; State v. King, 25 N. C. 411; 2 Whart. Cr. Law, § 1485 et seq.; Hill v. State, 4 Sneed (Tenn.) 443; State v. Inhabitants of Madison, 63 Me. 546.

[23] Seacord v. People, 121 Ill. 623, 13 N. E. 194.

that the business itself is useful or necessary, or that it contributes to the wealth and prosperity of the community.[24] Thus the fact that the business of rendering dead animals is a great public convenience is no defense;[25] nor is it a defense to an indictment for discharging the sewage of a town into a river that there was no other practicable way to drain the town, and the health of the inhabitants depended upon maintaining this outlet for its sewage;[26] nor to an indictment for maintaining shipping yards that they were a great and essential accommodation to the public, and that they were less offensive than any other answering the same public demand.[27] "The law does not balance conveniences, and it makes no difference if the work is really in the interest of society or necessary for the preservation of the public health. It is now well settled 'that the circumstance that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away, is no answer to an indictment for nuisance.'" [28] "The public health, the welfare and safety of the community, are matters of paramount importance, to which all pursuits, occupations, and employments of individuals inconsistent with their preservation must yield." [29]

[24] Anon., 12 Mod. 342; Rex v. Ward, 4 Adol. & E. 384; Respublica v. Caldwell, 1 Dall. (Pa.) 150, 1 L. Ed. 77; State v. Kaster, 35 Iowa. 221.

[25] Seacord v. People, 121 Ill. 623, 13 N. E. 194.

[26] Atty. Gen. v. Leeds, 39 L. J. 354.

[27] State v. Kaster, 35 Iowa, 221.

[28] Shope, J., in Seacord v. People, 121 Ill. 623, 13 N. E. 194.

[29] Com. v. Upton, 6 Gray (Mass.) 473; People v. Cunningham, 1 Denio (N. Y.) 524, at page 536, 43 Am. Dec. 709; Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Pittsburgh & Allegheny Bridge Co. v. Com. (Pa.) 8 Atl. 217; PEOPLE v. DETROIT WHITE LEAD WORKS, 82 Mich. 471, 46 N.

Nor does mere lapse of time give a right to maintain a nuisance;[80] nor, it seems, the fact that it was first established away from the population and that the population has approached,[81] although on this point there is a conflict of authority.[82]

On the other hand, in determining whether a particular business is a nuisance, the character of the surroundings must be considered. The distinction is between justifying an admitted nuisance and showing that the business is not a nuisance to the surrounding population. The character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle; for what would not be a nuisance in a manufacturing city might be such in a small town or village. "People who live in great cities that are sustained by manufacturing enterprises," it was said in a well-considered case,[83] "must necessarily be subject to many annoyances and positive discomforts, by reason of noise, dirt, smoke, and odors, more or less dis-

W. 735, 9 L. R. A. 722, Mikell Illus. Cas. Criminal Law, 215. See Whart. Cr. Law, §§ 1415, 1437–1440.

[80] See cases cited in preceding note.

[81] See cases cited in note 29.

[82] Rex v. Cross, 2 Car. & P. 483. See Ellis v. State, 7 Blackf. (Ind.) 534.

[83] Where defendants were charged with maintaining a public and common nuisance by operating an oil refinery in the city of Allegheny, which emitted noxious vapors, and in which were stored and used inflammable and explosive oils and gases, it being denied that the business was such nuisance, the character and location when the rofinery was established, the nature and importance of the business, the length of time which it had been operated, the capital invested, and the influence of the business on the growth and prosperity of the community were proper matters for the consideration of the jury in determining whether it was a public nuisance. Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170.

agreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants have a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city, and the manner and use of the river front for manufacturing purposes. If, looked at this way, it is a common nuisance, it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve."

Since the essence of a crime is that it is an infringement of the law of the state, if the state authorize what would otherwise be a nuisance, such authorization is a defense.[84] But such authorization by the state will be strictly construed, and if the business authorized can be conducted so as not to constitute a nuisance, conducting it otherwise is indictable.[85] The fact that it was the custom in the state to conduct such business as the accused is indicted for is no defense.[86]

BIGAMY OR POLYGAMY

116. Bigamy or polygamy is a statutory, and not a common-law, crime. It is committed where one, being legally married, marries another person during the life of his or her wife or husband.

117. EXCEPTIONS—The statutes generally except from their operation a person whose husband or wife

[84] Com. v. Reed, 34 Pa. 275, 75 Am. Dec. 661; Garrett v. State, 49 N. J. Law, 94, 7 Atl. 29, 60 Am. Rep. 592.

[85] See Garrett v. State, supra.

[86] Com. v. Perry, 139 Mass. 198, 29 N. E. 656.

has been absent for a certain number of years without being known by such person to be living within that time.

In England, prior to the passage of the statute of James I, in 1604,[87] bigamy or polygamy was punished in the ecclesiastical courts only. By that statute it was made a crime punishable in the civil courts. With us all of the states have statutes defining and punishing this crime, and, while they may differ slightly, they are substantially covered by the definition given above. Some of the statutes call the crime "polygamy," while others, substantially the same, call it "bigamy."

It is the second marriage that constitutes the crime, and it need not be proved that there was marital cohabitation and intercourse between the parties to the second marriage.[88] On a prosecution for bigamy, it is no defense that the second marriage was defective or voidable, or even that it was void, as, for instance, because of consanguinity; for, because of the first marriage, the second marriage is always necessarily void. It is the undertaking to contract the second marriage by procuring the ceremony to be performed, or what is equivalent thereto in a common-law marriage, that is punishable.[89] There must, how-

[87] 1 Jac. I, c. 2.

[88] Nelms v. State, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377; U. S. v. Cannon, 4 Utah, 122, 7 Pac. 369.

[89] 2 Whart. Cr. Law, § 1689; People v. Brown, 34 Mich. 339, 22 Am. Rep. 531; Reg. v. Brown, 1 Car. & K. 144; Reg. v. Allen, L. R. 1 Cr. Cas. 367; Carmichael v. State, 12 Ohio St. 553; Hayes v. People, 25 N. Y. 390, 82 Am. Dec. 364. A marriage by consent followed by "mutual assumption of marital rights, duties, or obligations" under Civ. Code, § 55, is sufficient basis for prosecution for bigamy. People v. Beevers, 99 Cal. 286, 33 Pac. 844. Where a person contracts a common-law marriage, lacking the formalities prescribed by stat-

ever, be an undertaking to do something which could under some circumstances amount to a valid marriage. Merely living in adultery with the second woman would not be bigamy.

It is a good defense, however, that the first marriage was absolutely void, for in such case there was no husband or wife living when the second marriage was contracted; but the fact that the first marriage was voidable is no defense, so long as it had not been actually avoided.[40] The statutes of some of the states expressly make the competent party to the bigamous marriage criminally liable if he or she knew of the first marriage, and, even in the absence of such a stat-

ute for solemnization of marriages, it is bigamy. People v. Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408.

[40] Shafher v. State, 20 Ohio, 1; State v. Barefoot, 2 Rich. (S. C.) 209; People v. McQuaid, 85 Mich. 123, 48 N. W. 161. On prosecution for bigamous third marriage, where it appears that defendant had married his second wife during his first wife's life, but was divorced from the first wife before the alleged bigamous marriage, he cannot be convicted, since, at the time of the last marriage, he is not legally married to another. Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; State v. Goodrich, 14 W. Va. 834. See, also, People v. Corbett, 49 App. Div. 514, 63 N. Y. Supp. 460; Keneval v. State, 107 Tenn. 581, 64 S. W. 397. Belief that the first marriage was void is no defense, being a mistake of law. Medrano v. State, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775; State v. Sherwood, 68 Vt. 414, 35 Atl. 352. Nor is it any defense that the other party to the first marriage was under the age of consent, where there was no separation by consent before she reached the age of consent, or refusal to consent on arriving at that age. People v. Slack, 15 Mich. 193. See, also, People v. Beevers, 99 Cal. 286, 33 Pac. 844. While reputation of being married is not sufficient proof of marriage to support a conviction of bigamy, proof that defendant had lived with B., a woman, that they had children, that they were regarded in the community in which they lived as husband and wife, and that defendant had declared both before and after his second marriage that B. was his wife, justifies a conviction. Bryan v. State, 63 Tex. Cr. R. 200, 139 S. W. 981.

ute, he or she should be liable as a principal in the second degree, on principle. It has been held that a third person present, aiding one of the principals in contracting the marriage was guilty as a principal in the second degree.[41]

By the terms of most, if not all, the statutes, a person who has been legally divorced a vinculo matrimonii does not commit bigamy by marrying again; but it is otherwise where the decree, as it may in some states, prohibits a second marriage, and such second marriage takes place in the state in which the decree was given;[42] or where the divorce is only a mensa et thoro, or where it was granted by a court having no jurisdiction;[43] or where the divorce was obtained subsequent to the second marriage.[44] Where there has been no valid divorce from the first marriage, an honest belief to the contrary, even founded on advice of counsel, is generally held to be no defense.[45]

Under the statutes, a person whose husband or wife has been absent for a certain number of years, specified in the statute, without being known by such person to be living

[41] Boggus v. State, 34 Ga. 275.

[42] People v. Faber, 92 N. Y. 146, 44 Am. Rep. 357; Baker v. People, 2 Hill (N. Y.) 325; Com. v. Putnam, 1 Pick. (Mass.) 136; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[43] Thompson v. State, 28 Ala. 12; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

[44] Baker v. People, 2 Hill (N. Y.) 325.

[45] State v. Goodenow, 65 Me. 30; Davis v. Com., 13 Bush (Ky.) 318; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Hughes, 58 Iowa, 165, 11 N. W. 706; State v. Armington, 25 Minn. 29; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800 (belief that marriage had been annulled by agreement); Russell v. State, 66 Ark. 185, 49 S. W. 821, 74 Am. St. Rep. 78; People v. Hartman, 130 Cal. 487, 62 Pac. 823. The contrary has been held in Indiana, where such belief was on reasonable grounds, after due care and inquiry. Squire v. State, 46 Ind. 459. See, also, Reg. v. Tolson, 23 Q. B. Div. 168.

within that time, does not commit bigamy by marrying again, as it may be presumed that the absent spouse is dead; but until the expiration of this time a person marries at his peril. Whether an honest, but erroneous, belief that the absent spouse was dead, is a defense, is a question concerning which, as we have seen,[46] there is some conflict of authority.[47] It is no defense that the religious belief of one who has committed bigamy required him to do so, as in case of Mormonism, and that the marriage ceremony was performed in good faith, and from a sense of religious duty, according to the rites of his church.[48]

ADULTERY

118. Some courts have recognized adultery as a common-law misdemeanor. Others hold that it is not a crime unless made so by statute.

119. The definitions of the crime vary.

(a) In some states it is voluntary sexual intercourse between persons one of whom is lawfully married to another, both parties being guilty.

(b) In other states it is such intercourse by a married person with one who is not his or her wife or husband, the married person only being guilty.

(c) In other states it is such intercourse with a married woman by one not her husband, both parties being guilty.

[46] Ante, p. 95.

[47] No defense, Com. v. Mash, 7 Metc. (Mass.) 472; Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2. Contra, Reg. v. Tolson, 23 Q. B. Div. 168.

[48] Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244.

Under the old Roman law, it was essential to the crime of adultery that the woman should be married to another, and the crime was not committed where a married man had sexual intercourse with a single woman, the gist of the offense being the danger of putting spurious offspring upon a man. Both parties were guilty. Under the English ecclesiastical law, it makes no difference which party is married, whether the man or the woman; and, if one is married, both are guilty.[49] In many of the states the statutes particularly define this crime, so as to leave no room for doubt or construction; while in others they merely declare that "adultery" shall be punished, thus leaving the definition of adultery to the courts, and the courts have differed in their defining. Thus, some have followed the definition of the English ecclesiastical law, and hold that the crime is committed by both parties where either is married to a third person.[50] Others, on the contrary, follow the old Roman law, and hold that the woman must be married, in which case both parties are guilty; and that the crime is not committed by either party where a married man has intercourse with a single woman.[51] In some states this defini-

[49] 2 Whart. Cr. Law, §§ 1718, 1719; Bish. St. Crimes, § 659.

[50] State v. Hinton, 6 Ala. 864; State v. Wilson, 22 Iowa, 364; State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59 (by statute). In Texas there must be either a "living together" and having carnal intercourse, or "habitual" intercourse without living together. Mere proof of carnal intercourse without living together is not enough. Mitten v. State, 24 Tex. App. 346, 6 S. W. 196. So, also, in South Carolina, State v. Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883; and in Illinois, Miner v. People, 58 Ill. 59. See post, p. 416.

[51] State v. Lash, 16 N. J. Law, 380, 32 Am. Dec. 397; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Wallace, 9 N. H. 515; State v. Pearce, 2 Blackf. (Ind.) 318; State v. Armstrong, 4 Minn. 335 (Gil. 251); Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; State v. Weatherby, 43 Me. 261, 69 Am. Dec. 59. But in Maine it is changed by statute in accord with preceding note. Id.

tion is declared by statute.[52] In other states the crime is defined, either by statute or by the courts, as voluntary sexual intercourse by a married person with a person who is not his or her wife or husband, the participant in the act, if single, not being guilty.[53]

Adultery was not a common-law crime in England, but was regarded as a crime against the ecclesiastical law only, and was therefore punished exclusively in the ecclesiastical courts. With us some of the courts have recognized this portion of the ecclesiastical law as part of our common law, and regard adultery as a common-law crime.[54] Other courts have taken the contrary view, and hold that, if adultery is not made a crime by statute, it cannot be punished at all as a distinctive crime, unless it amounts to open and notorious illicit cohabitation.[55] In some of these states it has been made a statutory crime. To constitute the crime, one of the parties at least must be lawfully married to another; and, on a prosecution for the crime, the marriage must be proved.[56] Unlawful sexual intercourse by a di-

[52] Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Com. v. Reardon, 6 Cush. (Mass.) 79.

[53] Com. v. Lafferty, 6 Grat. (Va.) 672; Miner v. State, 58 Ill. 59; Cook v. State, 11 Ga. 54, 56 Am. Dec. 410; Helfrich v. Com., 33 Pa. 68, 75 Am. Dec. 579; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; Hunter v. U. S., 1 Pin. (Wis.) 91, 39 Am. Dec. 277.

[54] State v. Avery, 7 Conn. 267, 18 Am. Dec. 105; State v. Cox, 4 N. C. 597.

[55] State v. Cooper, 16 Vt. 551; State v. Lash, 16 N. J. Law, 380, 32 Am. Dec. 397; State v. Brunson, 2 Bailey (S. C.) 149; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Com. v. Isaacs, 5 Rand. (Va.) 634; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Ex parte Thomas, 103 Cal. 497, 37 Pac. 514.

[56] State v. Armstrong, 4 Minn. 335 (Gil. 251); State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Miner v. State, 58 Ill. 59; Webb v. State, 24 Tex. App. 164, 5 S. W. 651; Banks v. State, 96 Ala. 78, 11 South. 404. The single state, being the natural state, will be pre-

vorced person is not adultery, if the status of the other party does not make it so, provided, of course, the divorce is valid; and this question is to be determined by the law of the forum.[57] It is otherwise if the divorce is invalid; and honest belief in its validity, even on advice of counsel, is, in general, no defense.[58] It has been held that if a man from whom his wife has obtained a divorce for his fault, or a woman from whom her husband is so divorced, marries again, in violation of a statute prohibiting marriage under such circumstances, he or she does not commit adultery, if the other party to the marriage is single, by cohabiting with her or him; for the reason that, to constitute adultery, one of the parties must be married.[59] But cohabitation with another before the entry of the final decree of divorce is adultery.[60]

It is never a defense that the accused, because of his religious belief, did not believe in the marriage vow; or that the act was in accord with local customs; or, in case of a foreigner, with foreign customs, as in case of adulterous intercourse under the free-love system in some localities; or in case of

sumed until a marriage is proved. Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600. When marriage is proved, the continuance of the married state will be presumed until the contrary appears. People v. Stokes, 71 Cal. 263, 12 Pac. 71. If the accused was married to woman under legal age, it must be shown that she acquiesced in the marriage on arriving at the age of consent and before the offense. People v. Bennett, 39 Mich. 208.

[57] State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59.

[58] 2 Whart. Cr. Law, § 1726; State v. Whitcomb, 52 Iowa, 85, 2 N. W. 970, 35 Am. Rep. 258; Fox v. State, 3 Tex. App. 329, 30 Am. Rep. 144; Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. Rep. 294; State v. Goodenow, 65 Me. 30; Com. v. Mash, 7 Metc. (Mass.) 472.

[59] State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59.

[60] Pratt v. Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97; Com. v. Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653.

adultery by foreigners who, when at home, are not required to regard the sanctity of the marriage vows.[61] It seems that honest belief in the death of the party's spouse is a good defense in case of absence for a length of time, and under circumstances warranting an inference of death, but not otherwise.[62] Where a formal marriage is duly celebrated, but one of the parties has a husband or wife living at the time, the marriage, of course, is unlawful; but the other party, if ignorant of the facts and acting in good faith, commits no wrong if the cohabitation is not continued after acquiring such knowledge, and is not guilty of adultery.[63] It would probably be otherwise if no marriage were celebrated, particularly if fornication were a crime in the particular jurisdiction; as the principle that, in order that ignorance of fact may exempt one from punishment, the original intention must not have been wrongful, would apply.[64] If force is used in accomplishing the intercourse, it is of course a defense to the party ravished, for the intercourse must be voluntary; but it is not a defense to the ravisher.[65] Emission need not be proved.[66] In some states it is ex-

[61] Bankus v. State, 4 Ind. 114.

[62] Com. v. Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653. It is no defense where the other party to the intercourse was the deserting spouse, since in such case the presumption of death does not arise. Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685; Whippen v. Whippen, 147 Mass. 294, 17 N. E. 644.

[63] Vaughan v. State, 83 Ala. 55, 3 South. 530; Banks v. State, 96 Ala. 78, 11 South. 404.

[64] Ante, pp. 95, 96; Bish. St. Crimes, § 665; Owens v. State, 94 Ala. 97, 10 South. 669; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

[65] State v. Summers, 98 N. C. 702, 4 S. E. 120; State v. Sanders, 30 Iowa, 582. Under such circumstances, if rape is proved, and adultery is a misdemeanor only, it would at common law merge, and the rape only could be punished. See ante, p. 45.

[66] Com. v. Hussey, 157 Mass. 415, 32 N. E. 362.

pressly provided that no prosecution for adultery can be commenced except on complaint of the husband or wife of the accused. If he or she does not object in these states, no one else can.[67] It has been held under such a statute that if the injured party withdraws a complaint after filing it the accused cannot be convicted.[68]

FORNICATION

120. Fornication is voluntary unlawful sexual intercourse, under circumstances not constituting adultery.

121. A single act of fornication is not a crime at common law, but is made so in some states by statute.

Fornication is not punishable at common law, unless it amounts to public lewdness or notorious illicit cohabitation,[69] though some doubt has been expressed as to this

[67] State v. Stout, 71 Iowa, 843, 32 N. W. 372; State v. Brecht, 41 Minn. 50, 42 N. W. 602; People v. Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438. This does not make complainant a party in the case. The people and the defendant are the only parties. Parsons v. People, 21 Mich. 509. Complaint for adultery between married woman and unmarried man is properly made by the woman's husband. Bayliss v. People, 46 Mich. 221, 9 N. W. 257; People v. Davis, 52 Mich. 569, 18 N. W. 362.

[68] People v. Dalrymple, 55 Mich. 519, 22 N. W. 20. Under similar statutes, a husband does not, by remarrying his wife after being divorced from her with knowledge of adultery committed by her during their former marriage, condone the offense, so as to bar a prosecution against her partner in adultery. State v. Smith, 108 Iowa, 440, 70 N. W. 115.

[69] Bish. St. Crimes, § 691; State v. Cooper, 16 Vt. 551; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Com. v. Isaacs, 5 Rand. (Va.) 634; Com. v. Jones, 2 Grat. (Va.) 555; Brooks v. State, 2 Yerg. (Tenn.) 482.

statement.[70] A single act of fornication has, however, been made a crime by statute in many of the states. The definition will vary in the different states, as in case of adultery. What is adultery in one state may be fornication in another. Voluntary sexual intercourse between two unmarried persons is fornication;[71] but the crime may also be committed where the intercourse is between a married man and an unmarried woman, both being guilty of fornication in some states, while in others the man is guilty of adultery and the woman of fornication, and in others, again, both may be guilty of adultery. So also, where the intercourse is between a single man and a married woman both may be guilty of adultery, or the man may be guilty of fornication only, according to the law of the particular state. The statutes and decisions of the particular state must be consulted.

LEWDNESS AND ILLICIT COHABITATION

122. For a man and woman to illicitly cohabit together, openly and notoriously, or for a person to be guilty of any open and notorious lewdness and indecency, is a crime at common law, as it constitutes a public scandal and nuisance.

While the common law does not punish acts of adultery or fornication committed privately, it is otherwise where they are committed openly, for they then become a public

[70] 2 Whart. Cr. Law, § 1741; State v. Cox, 4 N. C. 597.

[71] Territory v. Jaspar, 7 Mont. 1, 14 Pac. 647. That a person is unmarried will be presumed until the contrary appears. Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600. In some states fornication is only committed where there is a living together and having carnal intercourse, or habitual carnal intercourse without living together. Jones v. State, 29 Tex. App. 347, 16 S. W. 189. See post, p. 416.

scandal, and shock and corrupt the morals of the whole community. Therefore any open and notorious lewdness, or illicit cohabitation, is a common-law crime. In almost all, if not in all, of the states, there are statutes covering this subject. They are directed against "lewd and lascivious cohabitation," "illicit cohabitation," "living in" adultery or fornication, or "prostitution." To constitute a "living" together or "cohabitation," there must be more than a single act, or even occasional acts, of intercourse.[73] There must be a living together, though it is said that it may be for a single day only.[74] The offense is committed by a man who, at stated periods, goes openly to spend the night with a woman, not his wife, though during other nights he lives at home with his wife. He need not take up his abode with the strange woman.[74]

As in adultery, this crime is not committed by proof of cohabitation under an honest belief in marriage.[75]

[73] McLeland v. State, 25 Ga. 477; Smith v. State, 39 Ala. 554; State v. Crowner, 56 Mo. 147; State v. Osborne, 39 Mo. App. 372; People v. Gates, 46 Cal. 52; Richardson v. State, 37 Tex. 346; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Luster v. State, 23 Fla. 339, 2 South. 690; Pinson v. State, 28 Fla. 735, 9 South. 706; Pruner v. Com., 82 Va. 115; Brown v. State (Miss.) 8 South. 257. An abiding together in the same house or joint residing place must be shown. Bird v. State, 27 Tex. App. 635, 11 S. W. 641, 11 Am. St. Rep. 214. An instruction that occasional acts of adultery do not make out the offense, but if there was adulterous intercourse, and such a condition of the minds of the parties that, when opportunity offered, the act would be repeated, defendant was guilty, and that this condition makes a "living in adultery," was held proper. Bodiford v. State, 86 Ala. 67, 5 South. 559, 11 Am. St. Rep. 20. They must dwell openly together. Thomas v. State, 39 Fla. 437, 22 South. 725; Penton v. State, 42 Fla. 560, 28 South. 774.

[73] Hall v. State, 53 Ala. 463.

[74] Collins v. State, 14 Ala. 608. Mormonism, U. S. v. SNOW, 4 Utah, 280, 9 Pac. 501, Mikell Illus. Cas. Criminal Law, 226.

[75] Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411.

INCEST

123. It is doubtful whether incest is a crime at common law, but it is generally declared so by statute. It may be defined as illicit sexual intercourse between persons who are related within the degrees of consanguinity or affinity wherein marriage is prohibited by law.[76]

This crime is committed whenever sexual intercourse is had by a man and woman who are so nearly related that the law prohibits them from marrying, as in case of father and daughter, or brother and sister. Of course, they must know of their relationship, or be charged by law with such knowledge. If a brother and sister were to separate when children, and afterwards meet, and innocently marry, as has sometimes happened, they would not be guilty.[77] A mar-

[76] Bish. St. Crimes, §§ 727, 728; Daniels v. People, 6 Mich. 381; State v. Herges, 55 Minn. 464, 57 N. W. 205; Nations v. State, 64 Ark. 467, 43 S. W. 396. Between stepfather and stepdaughter, prior death of mother a defense. Johnson v. State, 20 Tex. App. 609, 54 Am. Rep. 535. Incest does not depend on the legitimacy of the parties, People v. Jenness, 5 Mich. 305; Baker v. State, 30 Ala. 521; People v. Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344; Clark v. State, 39 Tex. Cr. R. 179, 45 S. W. 576, 73 Am. St. Rep. 918; Brown v. State, 42 Fla. 184, 27 South. 869; Cecil v. Com., 140 Ky. 717, 131 S. W. 781, Ann. Cas. 1912B, 501; nor upon whether they are relatives of the whole or of the half blood, People v. Jenness, 5 Mich. 305; Shelly v. State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926. Half-brother is a brother within meaning of statute. State v. Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753. Half-brother of person's father is an "uncle." State v. Reedy, 44 Kan. 190, 24 Pac. 66. Half-niece, State v. Guiton, 51 La. Ann. 155, 24 South. 784. Stepdaughter, Taylor v. State, 110 Ga. 150, 35 S. E. 161. What is "affinity." Chinn v. State, 47 Ohio St. 575, 26 N. E. 986, 11 L. R. A. 630.

[77] 1 Hume, Comm. 448; STATE v. ELLIS, 74 Mo. 385, 41 Am. Rep. 321, Mikell Illus. Cas. Criminal Law, 229. But see State v. Wyman,

riage between the parties accused of incest is no defense if it was absolutely void, but it is otherwise where the marriage was merely voidable, and had never been annulled.[78] Consent of the female is no defense.[79] Some courts hold that this crime can only be committed by mutual consent of the parties; that if the intercourse is accomplished by force, it is punishable as rape only.[80] Other courts hold that mutual consent is not a necessary element.[81] One act of intercourse is enough to constitute the crime.[82] The reputation or character of the woman as chaste or unchaste is immaterial.[83]

59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753; State v. Dana, 59 Vt. 623, 10 Atl. 727. If one of the parties knows of the relationship, he or she is guilty. STATE v. ELLIS, 74 Mo. 385, 41 Am. Rep. 321, Mikell Illus. Cas. Criminal Law, 229. In some states knowledge is required by statute. Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691.

[78] Bish. St. Crimes, § 727; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Attorney General v. Broaddus, 6 Munf. (Va.) 116; Baker v. State, 30 Ala. 521.

[79] Schoenfeldt v. State, 30 Tex. App. 695, 18 S. W. 640.

[80] People v. Harriden, 1 Parker, Cr. R. (N. Y.) 344; De Groat v. People, 39 Mich. 124; State v. Jarvis, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep. 141; People v. Skutt, 96 Mich. 449, 56 N. W. 11; People v. Burwell, 106 Mich. 27, 63 N. W. 986; State v. Eding, 141 Mo. 281, 42 S. W. 935.

[81] State v. Chambers, 87 Iowa, 1, 53 N. W. 1090, 43 Am. St. Rep. 349; Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954; Smith v. State, 108 Ala. 1, 19 South. 306, 54 Am. St. Rep. 140; State v. Nugent, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133. If the female is under the age of consent, the crime is not incest. De Groat v. People, 39 Mich. 124.

[82] State v. Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790; Mathis v. Com. (Ky.) 13 S. W. 360.

[83] Mathis v. Com. (Ky.) 13 S. W. 360; People v. Benoit, 97 Cal. 249, 31 Pac. 1128.

MISCEGENATION

124. Miscegenation, or intermarriage between persons of the white and negro races, or the living together of such persons in adultery or fornication, is a statutory crime in some of the states.

A mulatto is a negro, within the meaning of these statutes.[84] On a prosecution for miscegenation, the female's character and reputation for chastity is immaterial, and cannot be attacked.[85] Ignorance of the law is no defense.[86] Proof that the parties lived together for a single day in adultery or fornication is sufficient; it is not necessary to show any agreement or understanding between them that sexual intercourse should be continued.[87] It has been held that these statutes are constitutional.[88]

SODOMY, BESTIALITY, AND BUGGERY

125. Sodomy is carnal copulation against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with a beast.[89]

[84] Linton v. State, 88 Ala. 216, 7 South. 261. Contra, where there is less than one-fourth negro blood. McPherson v. Com., 28 Grat. (Va.) 939.

[85] Linton v. State, 88 Ala. 216, 7 South. 261.

[86] Hoover v. State, 59 Ala. 57.

[87] Linton v. State, 88 Ala. 216, 7 South. 261.

[88] 2 Whart. Cr. Law, § 1754; State v. Gibson, 36 Ind. 404, 10 Am. Rep. 42; Pace v. State, 69 Ala. 231, 44 Am. Rep. 513, affirmed in 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207.

[89] Russ. Crimes, 937; 3 Inst. 58, 59; 1 Hawk. P. C. c. 4; 1 Hale, P. C. 669; 4 Bl. Comm. 215.

126. Bestiality is carnal copulation by a man or woman with a beast.

127. Buggery is sodomy.

These three terms are generally used synonymously, but it is not entirely clear that they can be correctly so used. There is some doubt whether the crime committed by man or woman with a beast is sodomy, as the term was originally understood,[90] but it is probably now so regarded. If so, then sodomy includes bestiality. Sodomy, however, is not synonymous with bestiality. The latter term applies only to copulation with a beast, and would not include unnatural copulation by man with man or woman. Buggery includes both sodomy and bestiality. The crimes are generally spoken of as the "abominable and detestable crime against nature." In Texas it was held that a statute punishing the crime against nature was not sufficiently definite to refer specifically to sodomy,[91] but this was probably because of a statute in that state providing that no person shall be punished for any crime unless the same shall be "expressly defined" in the statute punishing the same. In Louisiana a statute punishing the "abominable and detestable crime against nature committed with mankind or beast" was held sufficient, the court stating: "The books satisfy us that the crime referred to by the statute is known in the common law by the convertible and equivalent names of 'crime against nature,' 'sodomy,' and 'buggery.'"[92] Sodomy is named from the prevalence of the sin in the city of Sodom,

[90] Code Ga. §§ 4352, 4354; Ausman v. Veal, 10 Ind. 355, 71 Am. Dec. 331.

[91] Fennell v. State, 32 Tex. 378.

[92] State v. Williams, 34 La. Ann. 87; Honselman v. People, 168 Ill. 172, 48 N. E. 304. Woman included under "mankind." Lewis v. State, 36 Tex. Cr. R. 87, 35 S. W. 372, 61 Am. St. Rep. 831. See,

which the Bible tells us was destroyed by fire because of its wickedness. A fowl is not regarded as a beast, within the meaning of these definitions,[92] though this has in some jurisdictions been changed by statutes substituting the word "animal." [94] Both penetration and emission are necessary at common law,[95] but in some jurisdictions there are statutes declaring proof of emission unnecessary.[96] The act in a person's mouth is not enough.[97] It must be per anum. Both parties are guilty, and consent is therefore no defense.[98] These crimes were felonies under the old English common law.[99] Mr. Bishop states that it is doubtful whether under the common law with us it is a felony or a misdemeanor, but it is probably a felony.[1]

also, Com. v. Snow, 111 Mass. 411; Com. v. Dill, 160 Mass. 536, 36 N. E. 472; State v. Romans, 21 Wash. 284, 57 Pac. 819.

[92] Rex v. Mulreaty, cited in 1 Russ. Crimes, 938.

[94] Reg. v. Brown, 16 Cox, Cr. Cas. 715.

[95] See 2 Bish. New Cr. Law, § 1127 et seq.; People v. Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321; State v. Gray, 53 N. C. 170; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536. Contra, Com. v. Thomas, 1 Va. Cas. 307; Pennsylvania v. Sullivan, Add. (Pa.) 143. May be inferred from circumstances, People v. Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321.

[96] Rex v. Reekspear, 1 Moody, Cr. Cas. 342; and see cases in preceding note; State v. Vicknair, 52 La. Ann. 1921, 28 South. 273.

[97] Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Rex v. Jacobs, Russ. & R. 331; People v. Boyle, 116 Cal. 658, 48 Pac. 800.

[98] 2 Bish. Cr. Law, § 1193; 1 East, P. C. 480; Reg. v. Jellyman, 8 Car. & P. 604; Reg. v. Allen, 1 Denison, Cr. Cas. 364.

[99] 4 Bl. Comm. 215.

[1] 1 Bish. New Cr. Law, §§ 503 (1), 1196. See State v. La Forrest, 71 Vt. 311, 45 Atl. 225.

SEDUCTION

128. Seduction is probably not a crime at common law,[2] but it is made so by statute in most of the states. It may be defined generally as the act of a man in enticing an unmarried woman of previous chaste character, by means of persuasion and promises, to have sexual intercourse with him.

It is very doubtful whether there was any such offense as seduction at common law, but it was declared a crime by a very early English statute, and has been very generally declared a crime in this country. The statutes of the different states defining and declaring the crime of seduction differ somewhat. Some of them make it a crime to "seduce and debauch" an unmarried female of previous chaste character, saying nothing at all as to the means to be employed. Others make it a crime for any unmarried man, by promise of marriage, or for any married man, to seduce such a female.

Condition and Charater of Female

Under these statutes, it is necessary to show that the female was unmarried.[3] It is also essential that the woman shall have been of previous chaste character when seduced.[4]

[2] Bish. St. Crimes, § 625.

[3] State v. Wheeler, 108 Mo. 658, 18 S. W. 924; People v. Krusick, 93 Cal. 74, 28 Pac. 794. There is a conflict in the cases as to whether a divorced woman is "an unmarried female of previous chaste character." In Jennings v. Com., 109 Va. 821, 63 S. E. 1080, 21 L. R. A. (N. S.) 265, 132 Am. St. Rep. 946, 17 Ann. Cas. 64, it was held that she was not; while in People v. Weinstock (Mag. Ct.) 140 N. Y. Supp. 453, it was held that she was.

[4] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Munkers v.

The courts differ as to what is meant by previous chaste character. Some courts say that it means actual personal virtue, and not reputation, and that it is therefore only competent to show, in defense, specific acts of lewdness on the part of the woman.[5] It is further said that the statute is for the protection of the pure in mind and innocent in heart, who may be led astray; and that, therefore, a woman of lewd conversation and manners, and who is guilty of lascivious acts and indecent familiarity with men, is not protected, though she may never have been guilty of sexual intercourse.[6] A statute using the words "virtuous unmarried female" was held to apply to a woman who has never had sexual intercourse, and not to one who has.[7] In some of the states it is held that the law presumes that a woman was chaste until the contrary appears, and that the burden of proving want of chastity is on the accused.[8] Other courts

State, 87 Ala. 94, 6 South. 357; State v. Primm, 98 Mo. 368, 11 S. W. 732; Smith v. Milburn, 17 Iowa, 35. And see cases in following notes.

[5] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; Lyons v. State, 52 Ind. 427. See, also, ante, p. 285, note 4.

[6] Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708. And see Wood v. State, 48 Ga. 192, 15 Am. Rep. 664. The fact that the girl allowed men to embrace and kiss her was held not to indicate such a want of chastity as to overcome a verdict of guilty of seduction against the man. State v. McIntire, 89 Iowa, 139, 56 N. W. 419. See, also, People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52, in which the court says: "Chastity as here employed means, in the case of an unmarried female, simply that she is virgo intacta, and though one woman may permit liberties, or even indecencies, * * * so long as that woman has not surrendered her virtue, she is not put without the pale of the law."

[7] O'Neill v. State, 85 Ga. 383, 11 S. E. 856; People v. Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

[8] Wood v. State, 48 Ga. 192, 15 Am. Rep. 664; McTyler v. State, 91 Ga. 254, 18 S. E. 140; People v. Brewer, 27 Mich. 134; People v.

hold that, while chastity is generally presumed, the innocence of the accused is also presumed, and require the state to show affirmatively that the female was chaste.[9] In some states the statute is silent as to the character of the woman, but it is held that the legislature intended to protect chaste women only, and that the state must prove chaste character.[10] The fact that a woman has been unchaste does not deprive her of the protection of the statute, if she has reformed and is chaste when seduced.[11]

The Seduction

The statute in some states requires that the seduction shall be under promise of marriage. In others it says nothing about the character of the promises, but merely punishes a man who seduces and debauches an unmarried female of previous chaste character. To seduce, however, implies the use of promises and persuasions. Where the statute does not so require, the promise need not necessarily be of marriage. Any other subtle device or deceptive means in accomplishing the intercourse is sufficient.[12] There must

Squires, 49 Mich. 487, 13 N. W. 828; Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; State v. Hemm, 82 Iowa, 600, 48 N. W. 971; Mills v. Com., 93 Va. 815, 22 S. E. 863.

[9] Zabriskie v. State, 43 N. J. Law, 640, 39 Am. Rep. 610; Oliver v. Com., 101 Pa. 215, 47 Am. Rep. 704; State v. Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; State v. Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; People v. Wallace, 109 Cal. 611, 42 Pac. 159.

[10] Polk v. State, 40 Ark. 482, 48 Am. Rep. 17.

[11] State v. Carron, 18 Iowa, 372, 87 Am. Dec. 401; State v. Moore, 78 Iowa, 494, 43 N. W. 273; State v. Timmens, 4 Minn. 325 (Gil. 241); People v. Squires, 49 Mich. 487, 13 N. W. 828; People v. Clark, 33 Mich. 112; People v. Gibbs, 70 Mich. 425, 38 N. W. 257; Suther v. State, 118 Ala. 88, 24 South. 43.

[12] People v. Gibbs, 70 Mich. 425, 38 N. W. 257; Anderson v. State, 104 Ala. 83, 16 South. 108; Bracken v. State, 111 Ala. 68, 20 South. 636, 56 Am. St. Rep. 23. Coaxing language enough. State v. Hayes,

in all cases be some sufficient promise or inducement, and the woman must yield because of the promises. If she consents merely from carnal lust, and the intercourse is from mutual desire, there is no seduction.[13] A promise of compensation merely is not enough.[14] In some states a promise of marriage alone is enough,[15] while in others some additional persuasion is necessary.[16] A promise of marriage, however, even in those states where such a promise alone is sufficient, if made and understood as a mere matter of form, is not enough.[17] The promise of marriage need not be valid and binding, provided the woman believed in it and con-

105 Iowa, 82, 74 N. W. 757. In State v. Donovan, 128 Iowa, 44, 102 N. W. 791, where the artifices alleged to have been used were flattery and hypnotism, the court said: "About all that may be exacted by the law is that the false arts practiced be somewhat calculated to, and in fact do, accomplish the purpose alleged. From the evidence in the instant case the jury might well have found that the defendant had persistently sought, by flattery and love-making, and by pretending to exercise an occult influence over the prosecutrix, to acquire control over her, and that he so did with the design of gaining possession of her person."

[13] People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; State v. Primm, 98 Mo. 368, 11 S. W. 732.

[14] People v. Clark, 33 Mich. 112.

[15] Phillips v. State, 108 Ind. 406, 9 N. E. 345; State v. Abrisch, 41 Minn. 41, 42 N. W. 543.

[16] Putman v. State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738; O'Neill v. State, 85 Ga. 383, 11 S. E. 856. What constitutes, Jones v. State, 90 Ga. 616, 16 S. E. 380; McTyler v. State, 91 Ga. 254, 18 S. E. 140.

[17] People v. Clark, 33 Mich. 112. To promise to marry if she becomes pregnant is not to "seduce under promise of marriage." State v. Adams, 25 Or. 172, 35 Pac. 36, 22 L. R. A. 840, 42 Am. St. Rep. 790. Contra, State v. Hughes, 106 Iowa, 125, 76 N. W. 520, 68 Am. St. Rep. 288; People v. Van Alstyne, 144 N. Y. 361, 39 N. E. 343. Promise to marry when old enough sufficient. People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

sented in reliance on it;[18] but manifestly a promise by a man whom the woman knows to be already married is not such persuasion as will make him guilty of seduction under a statute requiring a promise of marriage.[19] If a chaste woman is undone under a promise of marriage, it will be no defense for the man to show that he made the promise in good faith.[20] For a man to represent to a girl that there is nothing wrong in the act, and that no one will find out, is to use artifice or fraud, and amounts to seduction.[21]

Rape or Seduction

Seduction is distinguished from rape by the fact that no force is used to accomplish the purpose. The woman is persuaded to consent in seduction, while the act is by force and against her will in rape. Consent therefore is no defense on a prosecution for seduction, as it is in case of rape.[22] If the woman does not consent, and force is used, the crime is rape, and there can be no conviction as for seduction;[23] but if consent was in fact obtained, the fact that force was also used is immaterial, as there cannot be rape with consent.[24]

[18] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211.

[19] Wood v. State, 48 Ga. 192, 15 Am. Rep. 664.

[20] People v. Samonset, 97 Cal. 448, 32 Pac. 520; State v. Bierce, 27 Conn. 319; State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

[21] State v. Hemm, 82 Iowa, 609, 48 N. W. 971.

[22] State v. Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

[23] People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; State v. Lewis, 48 Iowa, 578, 30 Am. Rep. 407; State v. Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613; Croghan v. State, 22 Wis. 444.

[24] Jones v. State, 90 Ga. 616, 16 S. E. 380; People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863. Ante, p. 243.

Marriage of the Parties

Under most of the statutes the marriage of the parties after the seduction is declared a defense.[25] In the absence of such a provision, it would be otherwise.[26] Mere promise of marriage after the seduction is not enough,[27] and in some, if not in all, states, an offer by the man to marry the woman does not relieve him from liability.[28] If the marriage takes place, the good or bad faith of the man in going through the ceremony is immaterial. He escapes punishment, even if he marries solely for that purpose.[29]

ABORTION

129. To procure an abortion is to cause or procure the miscarriage or premature delivery of a woman.

130. To procure an abortion, though with the mother's consent, after the child has quickened, is a misdemeanor at common law, but it is doubtful whether it is a crime before the child has quickened.

131. There are statutes in most of the states making it a felony to procure an abortion, whether the child has quickened or not.

[25] State v. Otis, 135 Ind. 267, 34 N. E. 954, 21 L. R. A. 733; People v. Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493; Wright v. State, 31 Tex. Cr. R. 354, 20 S. W. 756, 37 Am. St. Rep. 822; Com. v. Wright (Ky.) 27 S. W. 815; In re Lewis, 67 Kan. 562, 73 Pac. 77, 63 L. R. A. 281, 100 Am. St. Rep. 479.

[26] Ante, p. 9.

[27] State v. Mackey, 82 Iowa, 393, 48 N. W. 918.

[28] State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

[29] See cases cited in note 25. Under a statute providing that, if the offense of seduction is committed under promise of marriage, no prosecution shall be instituted when the person charged shall have married the girl seduced, the defendant cannot claim an acquittal

Without a doubt, the destruction of an unborn infant after it has quickened in the womb is a misdemeanor at common law.[80] At an early period it seems to have been deemed a homicide, though, as we have seen, this is no longer the case.[81] In Pennsylvania it was held a crime at common law to procure an abortion before the child had quickened. The court said in that case: "It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated." [82] Other courts have held the contrary.[83] In almost all, if not in all, of the

on the ground that the prosecutrix had intercourse with another subsequent to the seduction, so as to relieve him from the necessity of offering to marry the prosecutrix. "The statute provides a certain penalty for a certain crime, and that penalty can be avoided only in the precise manner pointed out by the statute." COM. v. HODGKINS, 111 Ky. 584, 64 S. W. 414, Mikell Illus. Cas. Criminal Law, 231. But it has been held that, under a statute providing that subsequent intermarriage of the parties is a bar to the prosecution for seduction, one who has been convicted for seduction cannot be sentenced therefor if subsequent to such conviction, and previous to the imposition of sentence, he has married the seduced woman. People ex rel. Scharff v. Frost, 198 N. Y. 110, 91 N. E. 376, 139 Am. St. Rep. 801.

[80] 1 Whart. Cr. Law, § 592; MILLS v. COM., 13 Pa. 631, Mikell Illus. Cas. Criminal Law, 233; Com. v. Bangs, 9 Mass. 387.

[81] Bracton says (folio 120, b): "If there be some one who has struck a pregnant woman, or has given her poison whereby he has caused abortion, if the fœtus be already formed and animated, and particularly if it be animated, he commits homicide." See ante, p. 167.

[82] MILLS v. COM., 13 Pa. 631, Mikell Illus. Cas. Criminal Law, 233; Com. v. Demain, 6 Pa. Law. J. 29; State v. Slagle, 82 N. C. 653.

[83] Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; Com. v. Bangs, 9 Mass. 387; State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248; Abrams v. Foshee, 3 Clarke (3 Iowa) 274, 66 Am. Dec. 77; Mitchell v. Com., 78 Ky. 204, 39 Am. Rep. 227; Smith v. State, 33 Me. 48, 54 Am. Dec. 607.

states, statutes have been passed defining and punishing abortion; and some of them do not require that the child shall have quickened.[84] Many of the statutes call the crime "manslaughter" in derogation of the common law.[85] There are also statutes in some of the states making it a crime to have possession of, or to sell or give away, instruments or drugs used for the purpose of committing abortions,[86] and statutes declaring it to be abortion to advise a woman to take medicine to procure a miscarriage.[87] The consent of the mother is no defense.[88] Indeed, a woman is guilty of the crime if she commits the abortion on herself. She is not, however, regarded strictly as an accomplice of a person who procures her miscarriage, but is looked upon rather as the victim.[89] If it is necessary to destroy a child in its mother's womb to save the mother's life, it may be done on the

[84] People v. Stockham, 1 Parker, Cr. R. (N. Y.) 424; Com. v. Wood, 11 Gray (Mass.) 86; State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; People v. Olmstead, 30 Mich. 431; Slattery v. People, 76 Ill. 217; Scott v. People, 141 Ill. 195, 30 N. E. 329; Lamb v. State, 67 Md. 524, 10 Atl. 208; Navarro v. State, 24 Tex. App. 378, 6 S. W. 542; Hatchard v. State, 79 Wis. 357, 48 N. W. 380; Holland v. State, 131 Ind. 568, 31 N. E. 359; Williams v. State (Tex. App.) 19 S. W. 897; Com. v. Surles, 165 Mass. 59, 42 N. E. 502. On a prosecution for attempt to commit an abortion by administering a drug, it was held no defense that the drug turned out to be harmless. State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148. In prosecution for act done with intent to procure miscarriage immaterial whether woman was enceinte. Eggart v. State, 40 Fla. 527, 25 South. 144.

[85] A statute making administration of drugs, etc., to a pregnant woman for purpose of procuring abortion manslaughter in second degree held invalid, as manslaughter cannot exist without death of woman or child. State v. Young, 55 Kan. 349, 40 Pac. 659.

[86] State v. Forsythe, 78 Iowa, 595, 43 N. W. 548.

[87] People v. Phelps, 133 N. Y. 267, 30 N. E. 1012.

[88] 1 Whart. Cr. Law, § 594.

[89] 1 Whart. Cr. Law, § 593; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471.

ground of the necessity. This necessity is also recognized by the statutes.[40] As we have already seen, it is either murder or manslaughter if the mother is killed in attempting to procure an abortion;[41] and it is murder if the child is born alive, and dies from wounds received while in the womb, or dies because prematurely born by reason of the drug administered.[42] In some of the states, statutes have been enacted making it a crime to conceal the death of a bastard child.

[40] Hatchard v. State, 79 Wis. 357, 48 N. W. 380; People v. McGonegal, 62 Hun, 622, 17 N. Y. Supp. 147. Indictment must allege that miscarriage was not necessary to save life. State v. Stevenson, 68 Vt. 529, 35 Atl. 470; State v. Moothart, 109 Iowa, 130, 80 N. W. 301. Presumption that miscarriage is not necessary is sufficient to prove negative averment in absence of evidence. State v. Lee, 69 Conn. 186, 37 Atl. 75. Burden to negative exception on state. State v. Aiken, 109 Iowa, 643, 80 N. W. 1073.

[41] Ante, p. 213, note 59; p. 231, note 36.

[42] Ante, p. 167.

CHAPTER XIII

OFFENSES AGAINST PUBLIC JUSTICE AND AUTHORITY

132–134. Common Barratry, Maintenance, and Champerty.
135. Obstructing Justice.
136. Embracery.
137–139. Escape, Prison Breach, and Rescue.
140. Misprision of Felony.
141. Compounding Crime.
142–143. Perjury and Subornation of Perjury.
144. Bribery.
145–147. Misconduct in Office.

COMMON BARRATRY, MAINTENANCE, AND CHAMPERTY

132. Common barratry is the offense of frequently exciting and stirring up suits and quarrels either at law or otherwise.[1]

133. Maintenance is the officious intermeddling in a suit that in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it.[2]

134. Champerty is a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.[3]

[1] 4 Bl. Comm. 134; 1 Hawk. P. C. 243; Com. v. Davis, 11 Pick. (Mass.) 433.

[2] 4 Bl. Comm. 134; 1 Hawk. P. C. 249.

[3] 4 Bl. Comm. 135; Hawk. P. C. 257. Though this is Blackstone's definition, it has been said that the champertor need not carry on the suit at his own expense; that it may be where an attorney

These three offenses have some features in common, and are all old common-law crimes, because encouragement of strife and litigation is injurious to the public interests. An example of champerty is where an attorney agrees to carry on a suit, and take as compensation a part of what he may recover,[4] or where one purchases and takes an assignment of a chose in action or right to sue in equity,[5] or purchases land or personalty held adversely by another than the vendor at the time of the purchase.[6] A person who is in no way concerned in a suit is as a rule guilty of maintenance if he bears the expense or retains counsel for a party, but it is otherwise if he has an interest, as that of reversioner, or where he is related to the party he assists.[7] A landlord may assist his tenant, or a master his servant, and one may

merely agrees to conduct the suit for a contingent compensation. Lathrop v. President, etc., of Amherst Bank, 9 Metc. (Mass.) 489. But see, contra, Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730; Phillips v. South Park Com'rs, 119 Ill. 626, 10 N. E. 230.

[4] Lathrop v. President, etc., of Amherst Bank, 9 Metc. (Mass.) 489; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464.

[5] Illinois Land & Loan Co. v. Speyer, 138 Ill. 137, 27 N. E. 931. The purchase must be for the purpose of suing thereon. West v. Kurtz (Com. Pl.) 2 N. Y. Supp. 110, and 3 N. Y. Supp. 14; Burnham v. Heselton, 84 Me. 578, 24 Atl. 955.

[6] Bentley v. Childers (Ky.) 7 S. W. 628; Combs v. McQuinn (Ky.) 9 S. W. 495; Nelson v. Brush, 22 Fla. 374; Bleidorn v. Pilot Mountain Coal & Min. Co., 89 Tenn. 166, 204, 15 S. W. 737; Smith v. Price (Ky.) 7 S. W. 918. Conveyance under a contract made before land was held adversely is not champertous. Greer v. Wintersmith, 85 Ky. 516, 4 S. W. 232, 7 Am. St. Rep. 613; Thacker v. Belcher (Ky.) 11 S. W. 3. Does not apply in some states. In re Murray's Estate, 13 Pa. Co. Ct. R. 70. Sale of personalty in adverse possession of another is champertous. Erickson v. Lyon, 26 Ill. App. 17; Foy v. Cochran, 88 Ala. 353, 6 South. 685.

[7] Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Davies v. Stowell, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190; Williamson v. Sammons, 34 Ala. 691; Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272.

assist a poor man to carry on his suit.[8] A single act is not sufficient to constitute the crime of common barratry, but there must be a series of acts, not less than three, the essence of the offense being that the offender shall be a "common" barrator.[9] It is no crime for one to frequently bring unsuccessful actions in his own right, except probably where he brings ungrounded suits, merely for the purpose of annoying his adversary.[10] A justice of the peace is guilty of this crime if he stirs up criminal prosecutions to be brought before himself, as magistrate, for the purpose of obtaining fees.[11] There is no certainty as to the extent to which these offenses as common-law crimes would be recognized in this country. Very many of the courts have refused to recognize the crimes of champerty and maintenance, or have materially restricted the application of the old common-law doctrine.[12]

[8] 4 Bl. Comm. 135.

[9] Com. v. Davis, 11 Pick. (Mass.) 432; Com. v. McCulloch, 15 Mass. 227.

[10] Com. v. McCulloch, 15 Mass. 227.

[11] State v. Chitty, 1 Bailey (S. C.) 379.

[12] Sherley v. Riggs, 11 Humph. (Tenn.) 53; Danforth v. Streeter, 28 Vt. 490; Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, 1 L. R. A. 516, 12 Am. St. Rep. 508; Sedgwick v. Stanton, 18 Barb. (N. Y.) 473, affirmed in 14 N. Y. 289; Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; Winslow v. Central Iowa Ry. Co., 71 Iowa, 197, 32 N. W. 330; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Dunne v. Herrick, 37 Ill. App. 180; Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444; Brown v. Bigne, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752. But see Key v. Vattier, 1 Ham. (1 Ohio) 132. Common law is virtually repealed by statute in many states. Wildey v. Crane, 63 Mich. 720, 30 N. W. 327; Bundy v. Newton, 65 Hun, 619, 19 N. Y. Supp. 734; Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C.) 55 Fed. 44.

OBSTRUCTING JUSTICE

135. It is a misdemeanor at common law to obstruct public or private justice, as by resisting or obstructing an officer in the exercise of his duty, or preventing attendance of witnesses.

Any willful obstruction of justice by resisting an officer who is endeavoring to perform his official duty is a crime at common law,[13] and is also particularly made a crime by statute in many states. A person who resists or obstructs an attempt to make an arrest or maintain the peace,[14] or one who prevents the execution of civil process, as, for instance, the levy of a writ of attachment or replevin,[15] is

[13] 1 Bish. New Cr. Law, § 467; 2 Bish. Cr. Law, § 1009. A constable was stationed at each end of an automobile trap for the purpose of detecting breaches of a motor car act. Defendant, an officer of the Automobile Association, gave signals to the drivers of cars belonging to the association, who were driving beyond the speed limit, to reduce the speed of their cars. It was held that defendant was guilty of obstructing an officer in the execution of his duty. Betts v. Stevens, [1910] 1 K. B. ——. Cf. Bastable v. Little, [1907] 1 K. B. 59. One who prevented an officer from taking goods was not guilty of obstructing an officer in the discharge of his duty, where the officer was acting without a writ and had no right to take the goods. STATE v. HARTLEY, 74 Conn. 64, 49 Atl. 860, Mikell Illus. Cas. Criminal Law, 235.

[14] People v. Haley, 48 Mich. 495, 12 N. W. 671; People v. Hamilton, 71 Mich. 340, 38 N. W. 921; State v. Dula, 100 N. C. 423, 6 S. E. 89. Resisting unlawful arrest not punishable. See ante, pp. 270, 272. People v. McLean, 68 Mich. 480, 36 N. W. 231; Merritt v. State (Miss.) 5 South. 386; Hamlin v. Com. (Ky.) 12 S. W. 146.

[15] Braddy v. Hodges, 99 N. C. 319, 5 S. E. 17; Com. v. McHugh, 157 Mass. 457, 32 N. E. 650; State v. Barrett, 42 N. H. 466. Resisting attempt to attach exempt property, where no unnecessary force is used, is not punishable. People v. Clements, 68 Mich. 655, 36 N. W. 792, 13 Am. St. Rep. 373. See, also, ante, p. 272. Retaking prop-

guilty of obstructing justice. To tamper with witnesses or prevent their attendance is also a crime.[16]

EMBRACERY

136. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.[17]

Any corrupt attempt to influence a jury to render their verdict for one side as against the other is a misdemeanor at common law. It may be by offering them money, by using illegitimate persuasions or entreaties, by treating them, or by making promises.[18] Of course, arguments of counsel in open court at the trial of a cause are a legitimate use of influence, and are not within the definition; but it would be a crime to take advantage of the opportunity afforded, in order to corruptly influence the jurors.[19] Where

erty levied on and left by officer with third person, not obstructing officer. Davis v. State, 76 Ga. 721. Preventing execution sale, State v. Morrison, 46 Kan. 679, 27 Pac. 133.

[16] 1 Bish. New Cr. Law, § 468. To forge documents for the purpose of securing a pardon is indictable as interfering with the administration of public justice. Rex v. White, 6 S. R. (N. S. W.) 398. So to attempt to mislead board of arbitration authorized by law. Reg. v. Vreones, [1891] 1 Q. B. 360. Under a statute making it a misdemeanor "to knowingly obstruct any officer in serving or attempting to serve any lawful process or order," one is not guilty who merely refuses, upon the demand of a levying officer, to unlock a door of a house in order to enable him to enter the same for the purpose of levying a lawful process upon goods contained therein. Vince v. State, 113 Ga. 1070, 39 S. E. 435.

[17] 4 Bl. Comm. 140; State v. Brown, 95 N. C. 685; 2 Bish. New Cr. Law, §§ 384–389; State v. Sales, 2 Nev. 268; Gibbs v. Dewey, 5 Cow. (N. Y.) 503.

[18] People v. Myers, 70 Cal. 582, 12 Pac. 719.

[19] 1 Hawk. P. C. 466; Paul v. City of Detroit, 32 Mich. 108, 118.

an attempt to influence a jury amounting to embracery is made, it is immaterial whether they give any verdict or not, and, if they give a verdict, it is no defense that it is a true verdict. A juror may himself commit this crime if he corruptly attempts to influence the other jurors.

ESCAPE, PRISON BREACH, AND RESCUE

137. The crime of escape is committed

(a) By an officer or other person, having lawful custody of a prisoner, where he voluntarily or negligently allows him to depart from such custody otherwise than in due course of law.

(b) By a prisoner, where he voluntarily departs from lawful custody without breach of prison.

138. Prison breach is the breaking and going out of his place of confinement by one who is lawfully imprisoned.

139. Rescue is the forcible delivery of a prisoner from lawful custody by one who knows that he is in custody.

Escape[20]*—Liability of Officer*

An officer who voluntarily suffers a prisoner to escape is at common law involved in the same guilt and liable to the same punishment as the prisoner. If the escape is due to the officer's negligence, he is guilty of a misdemeanor only. In order that he may be held criminally liable, however, the prisoner must have been in custody for some criminal matter, and the imprisonment must have been lawful.[21] A

[20] 2 Bish. New Cr. Law, § 1092 et seq.

[21] Hitchcock v. Baker, 2 Allen (Mass.) 431. Under a statute de-

private person who has lawfully made an arrest is at common law liable equally for an escape as if he were an officer.

Same—Liability of Prisoner

A prisoner who escapes from lawful custody without breach of prison commits a misdemeanor only, whatever may have been the crime for which he was in custody. Consent of the officer having him in custody gives a prisoner no right to escape, and furnishes him no defense. If the warrant of arrest or commitment was void, the prisoner is not liable for escaping; but, if the imprisonment was lawful, his innocence or guilt is immaterial.[22] It is no defense that the jail was filthy and unhealthy.[23]

Prison Breach[24]

Under the old common law, any prison breach was a felony, but this was changed by a statute which is part of our common law;[25] and now it is a felony only where the imprisonment was for a felony, and a misdemeanor in other cases. The crime may be committed by one imprisoned on civil process, but in such case it is a misdemeanor only. The question of the prisoner's guilt or innocence is immaterial, but the imprisonment must be lawful, as in case of escape. Where the imprisonment is illegal, as, for instance,

fining "escape" to be voluntarily or negligently permitting a person lawfully confined in jail to leave the prison before he is entitled to be released therefrom, a jailer who permits a prisoner to go at large from time to time is guilty of an escape. Ex parte Shores (D. C.) 195 Fed. 627.

[22] State v. Leach, 7 Conn. 452, 18 Am. Dec. 113; State v. Lewis, 19 Kan. 260, 27 Am. Rep. 113.

[23] State v. Davis, 14 Nev. 439, 33 Am. Rep. 563.

[24] 2 Bish. New Cr. Law, § 1070 et seq.

[25] 1 Edw. II, Stat. 2.

where it is under a void warrant, the offense is not committed, provided no more than necessary force is used.[26] It is otherwise where the process of commitment is merely informal.[27] There must be a breaking and an exit. Merely climbing over a prison wall is not a prison breach, though it has been said that it is otherwise if a loose stone is thrown from the top of the wall.[28] The breaking need not necessarily be from a public prison, but may be from any place of confinement, and it seems that forcible breaking from an officer in the street is sufficient.[29] If there is no breaking or force, the crime is merely an escape.

Rescue [30]

Rescue is a felony or misdemeanor, according to the crime with which the prisoner is charged. Mere breach of the prison in an attempt to deliver a prisoner is not a rescue, but there must be an actual exit by the prisoner. One who lawfully escapes from imprisonment under a void warrant is not liable because other prisoners lawfully confined escape with him in consequence of his breaking out of the prison.[31]

[26] State v. Leach, 7 Conn. 452, 18 Am. Dec. 113.

[27] State v. Murray, 15 Me. 100.

[28] Rex v. Haswell, Russ. & R. 458.

[29] 2 Hawk. P. C. c. 18, § 4; Rex v. Bootle, 2 Burrows, 864; Rex v. Stokes, 5 Car. & P. 148; Com. v. Filburn, 119 Mass. 297; State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93.

[30] 2 Bish. New Cr. Law, § 1085 et seq.; State v. Garrett, 80 Iowa, 589, 46 N. W. 748.

[31] State v. Leach, 7 Conn. 452, 18 Am. Dec. 113.

MISPRISION OF FELONY

140. Misprision of felony is a criminal neglect either to prevent a felony from being committed or to bring to justice the offender after its commission.[83]

To constitute this offense there must be mere knowledge of the offense, and not an assent or encouragement; for, if the latter, the person becomes principal or accessary. The crime is a misdemeanor. Misprision of treason is explained in treating of treason.

COMPOUNDING CRIME

141. The offense of compounding a crime is committed where one who knows that it has been committed agrees, for a consideration, not to prosecute it.[84]

Compounding a felony, or forbearing to prosecute a felon on account of some reward received, is a misdemeanor at common law. The reward need not be money, but any advantage accruing from the felon to the person forbearing is sufficient, as where the owner of stolen goods agrees not to prosecute the thief on consideration of the goods being returned.[84] The crime, however, is not confined to the person particularly injured by the felony, as in the case just mentioned, but any one who, knowing that a felony has been committed, receives a reward on his agreement not to prosecute the felon, is guilty. The mere taking back of

[83] 1 Bish. New Cr. Law, § 716 et seq.

[84] 4 Bl. Comm. 133; 1 Bish. New Cr. Law, § 709 et seq.; Watson v. State, 29 Ark. 299.

[84] Com. v. Pease, 16 Mass. 91.

stolen goods, without any agreement or showing of favor, is no crime. The crime is complete when the reward is received, and the agreement not to prosecute is made, whether the agreement is carried out or not. In this respect it is something like conspiracy; indeed, it is a conspiracy to prevent public justice. To compound a misdemeanor is indictable at common law, only where the misdemeanor is of a public rather than a private nature.[85] This does not therefore prevent settlements for assaults and private cheats; but to agree not to prosecute for a riot is a crime.[86]

PERJURY AND SUBORNATION OF PERJURY

142. Perjury, at common law, is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. Perjury is a misdemeanor.

143. Subornation of perjury is the procuring of another to commit perjury. Perjury must be actually committed.

The Oath

The oath must be a lawful one; that is, it must be legally administered by an officer duly authorized;[87] but the form

[85] Compounding a public misdemeanor (illegal sale of spirituous liquor) is indictable at common law. It is not essential that an offense was committed by the person from whom money is received. State v. Carver, 69 N. H. 216, 39 Atl. 973.

[86] Jones v. Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; Keir v. Leeman, 6 Q. B. 308, 9 Q. B. 371.

[87] Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293; Morrell v. People, 32 Ill. 499; U. S. v. Manion (D. C.) 44 Fed. 800; State v.

is immaterial, provided the witness professes it to be binding on him.[38] It need not necessarily be taken on the Scriptures. Affirmation, by one opposed to swearing on the Scriptures, or any other form of oath authorized by law, is sufficient. An oath in some form is essential, or false testimony will not be perjury.[39] An oath taken on a book believed to be the Scriptures, but not so in fact, will sustain a charge of perjury.[40] The oath must be material; otherwise there is no perjury, even though the facts stated may be material. Thus, where a person falsely swears to an answer in a suit, he does not commit perjury, if he was not required to swear to it, and his oath could not affect the issue or strengthen the answer.[41]

The Proceeding and Jurisdiction

To constitute perjury at common law, the false testimony must be in a judicial proceeding or course of justice.[42] The making of a false affidavit in other than judicial proceed-

Wilson, 87 Tenn. 693, 11 S. W. 792; U. S. v. Bedgood (D. C.) 49 Fed. 54; Walker v. State, 107 Ala. 5, 18 South. 393; U. S. v. Garcelon (D. C.) 82 Fed. 611.

[38] People v. Tarvis, 4 Parker, Cr. R. (N. Y.) 213; State v. Gates, 17 N. H. 373; Van Dusen v. People, 78 Ill. 645; State v. Wyatt, 3 N. C. 56; Biggerstaff v. Com., 11 Bush (Ky.) 169.

[39] O'Reilly v. People, 86 N. Y. 154, 40 Am. Rep. 525; Case v. People, 76 N. Y. 242.

[40] People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451.

[41] Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539. Where defendant made an oath, for the purpose of obtaining a license, that he had never been charged with a violation of law, and the statute under which the license was granted required no such oath, it was held that he was not guilty of perjury. State v. Parrish, 129 La. 547, 56 South. 503, 39 L. R. A. (N. S.) 96.

[42] 2 Bish. New Cr. Law, § 1026; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; State v. Chamberlin, 30 Vt. 559; State v. Simons, 30 Vt. 620; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; State v. Chandler, 42 Vt. 446.

ings, it has been said, is not technically perjury, though it is a misdemeanor.[43] It is, however, generally held that to take a false oath as to an existing fact in any proceeding required or authorized by law for the purpose of establishing a legal right is perjury.[44] To take a false oath to an affidavit required by law is held to be perjury,[45] but it is otherwise if the affidavit is not required by law.[46] Where the false testimony is given in a judicial proceeding, it need not be in reference to the principal issue, but it is sufficient if it is material to any inquiry in the course of the proceeding.[47] The court or tribunal must have jurisdiction of the proceeding in which the false oath is taken,[48] but, if jurisdiction exists, mere irregularities in the proceeding are immaterial.[49]

[43] 2 Whart. Cr. Law, § 1267.

[44] Otherwise if the oath is merely promissory—as an oath of office. State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[45] State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; State v. Estabrooks, 70 Vt. 412, 41 Atl. 499.

[46] People v. Tarvis, 4 Parker, Cr. R. (N. Y.) 213; Silver v. State, 17 Ohio, 365; People v. Gaige, 26 Mich. 30 (bill in equity not required to be sworn); Davidson v. State, 22 Tex. App. 372, 3 S. W. 662; State v. McCarthy, 41 Minn. 59, 42 N. W. 599.

[47] State v. Keenan, 8 Rich. (S. C.) 456. False affidavit for continuance, State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; Sanders v. People, 124 Ill. 218, 16 N. E. 81.

[48] State v. Furlong, 26 Me. 69; State v. Alexander, 11 N. C. 182; Pankey v. People, 1 Scam. (2 Ill.) 80; State v. Jenkins, 26 S. C. 121, 1 S. E. 437; Renew v. State, 79 Ga. 162, 4 S. E. 19; State v. Wymberly, 40 La. Ann. 460, 4 South. 161. Where a police court has no jurisdiction to try a person for a certain crime without a jury, a false statement made by a witness on a trial by the court alone for such crime is not perjury. U. S. v. Jackson, 20 D. C. 424.

[49] State v. Lavalley, 9 Mo. 834; Anderson v. State, 24 Tex. App. 705, 7 S. W. 40; Maynard v. People, 135 Ill. 416, 25 N. E. 740. Where perjury is charged against a witness in a trial of a criminal proceeding which was begun by warrant, it is no defense that the warrant was issued without complaint or affidavit, even though such com-

Intent—Falsity of Testimony

The false testimony must be willfully and corruptly given.[50] To testify rashly and inconsiderately according to belief, or inadvertently, or by mistake, is not perjury.[51] It is said by Hawkins that no one ought to be found guilty without clear proof that the false oath was taken with some degree of deliberation; for if, upon all the circumstances of the case, it appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise or inadvertency, or a mistake of the true state of the question, it cannot be but hard to make it amount to voluntary and corrupt perjury.[52] To take an oath in good faith, under advice of counsel, is not perjury.[53] Though the fact asserted may be true, it is perjury if the witness believed that it was not true, and corruptly made the assertion.[54] It has been held that it is perjury for a witness to swear that he thinks or believes a certain fact

plaint or affidavit is necessary to the validity of the warranty. Reg. v. Hughes, 14 Cox, Cr. Cas. 284; State v. Peters, 107 N. C. 876, 12 S. E. 74. Nor is it a defense that the jury trying the case in which the false testimony was given was not sworn. Smith v. State, 31 Tex. Cr. R. 315, 20 S. W. 707.

[50] U. S. v. Babcock, 4 McLean, 113, Fed. Cas. No. 14,488; State v. Hascall, 6 N. H. 352; Gibson v. State (Tex. App.) 15 S. W. 118.

[51] U. S. v. Atkins, 1 Spr. 558, Fed. Cas. No. 14,474; U. S. v. Passmore, 4 Dall. 372, Fed. Cas. No. 16,005; U. S. v. Moore, 2 Low. 232, Fed. Cas. No. 15,803; Tuttle v. People, 36 N. Y. 434.

[52] 1 Hawk. P. C. 429; 2 Bish. New Cr. Law, § 1045.

[53] U. S. v. Stanley, 6 McLean, 409, Fed. Cas. No. 16,376; State v. McKinney, 42 Iowa, 205; U. S. v. Conner, 3 McLean, 573, Fed. Cas. No. 14,847; Com. v. Clark, 157 Pa. 257, 27 Atl. 723.

[54] 2 Bish. New Cr. Law, § 1043. If one corruptly swears to a fact as of his own knowledge, when he had not the knowledge, it is perjury. Nor does it matter that the statement be true, if the witness did not know it to be so. Com. v. Miles, 140 Ky. 577, 131 S. W. 885, 140 Am. St. Rep. 401.

when he thinks or believes the contrary,[55] or to swear that a fact exists where he knows nothing about it.[56] For a witness to equivocally use words which in one sense are true, but which he intends to be, and which are, understood in another and an untrue sense, was held perjury in an old English case. According to the weight of authority, drunkenness is a defense, as it may negative the existence of such a state of mind as is capable of giving "willfully corrupt," false testimony;[57] but there are decisions to the contrary.[58]

Materiality of Testimony

The false testimony must be material to the issue or matter of inquiry.[59] To be material it must be of such a character as would, if believed, tend to affect the verdict of the jury in the particular case. Thus false testimony given at a coroner's inquest, as to the whereabouts of a certain person at the time of the death, such person not being under suspicion as having caused the death, is not perjury;[60] nor is it perjury to testify falsely that one lived near the place where a certain sale took place, the fact of the sale not being

[55] Rex v. Pedley, 1 Leach, 327; Reg. v. Schlesinger, 10 Q. B. 670; Com. v. Edison (Ky.) 9 S. W. 161.

[56] State v. Gates, 17 N. H. 373.

[57] 2 Bish. New Cr. Law, § 1048; Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 903; McCord v. State, 83 Ga. 521, 10 S. E. 437.

[58] People v. Willey, 2 Parker, Cr. R. (N. Y.) 19.

[59] People v. Collier, 1 Mich. 137, 48 Am. Dec. 699; State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Wood v. People, 59 N. Y. 117; Rump v. Com., 30 Pa. 475; Com. v. Pollard, 12 Metc. (Mass.) 225; State v. Smith, 40 Kan. 631, 20 Pac. 529; Jennings v. State (Miss.) 7 South. 462; People v. Perazzo, 64 Cal. 106, 28 Pac. 62; People v. Ah Sing, 95 Cal. 657, 30 Pac. 797; Martin v. Miller, 4 Mo. 47, 28 Am. Dec. 342; Leak v. State, 61 Ark. 599, 33 S. W. 1067; State v. Brown, 68 N. H. 200, 38 Atl. 731.

[60] Nelson v. State, 32 Ark. 192.

material.[61] So, if the question at issue is whether a certain person brought a certain number of sheep from one town to another, it is not perjury to testify that he brought them all at one time, when in fact he brought them partly at one time and partly at another.[62] So, when the question at issue was only whether A. beat B., it was not perjury for a witness to swear that A. *drew his dagger* and beat and wounded B.[63]

But the materiality of the testimony must in all cases depend on the facts and circumstances of the particular case. If material, the extent of the materiality is unimportant. Thus, it is perjury to testify to facts affecting the credibility of the witness himself, as on cross-examination, or the credibility of other witnesses.[64] It makes no difference that the testimony was legally inadmissible if it was material;[65] nor that defendant was not a competent witness;[66] nor that he could not have been compelled to testify;[67] and it is not necessary that the testimony shall have been believed or have had any influence.[68] The testimony need not necessarily be material to the principal issue in the proceeding, but it is sufficient if it is material to any collateral inquiry

[61] State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580.

[62] Hawk. P. C. (6th Ed.) 323.

[63] Hawk. P. C. (6th Ed.) 323.

[64] Com. v. Grant, 116 Mass. 17; Wood v. People, 59 N. Y. 117; State v. Brown, 79 N. C. 642; State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580; Washington v. State, 22 Tex. App. 26, 8 S. W. 228; Williams v. State, 28 Tex. App. 301, 12 S. W. 1103.

[65] 2 Whart. Cr. Law, §§ 1279, 1280.

[66] Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255.

[67] Mackin v. People, 115 Ill. 312, 3 N. E. 222; Mattingly v. State, 8 Tex. App. 345. One may be convicted of perjury in falsely testifying in his own behalf on the trial for a criminal offense. Allen v. U. S., 194 Fed. 664, 114 C. C. A. 357, 39 L. R. A. (N. S.) 385.

[68] Hoch v. People, 3 Mich. 552; Pollard v. People, 69 Ill. 148.

in the course of the proceeding.[69] Thus a false affidavit, made to secure the continuance of a suit, is perjury.[70]

The materiality of the testimony must be proved by the prosecution; it will not be presumed from the fact that the testimony was admitted in the trial.[71]

BRIBERY

144. Bribery at common law is defined by Blackstone to be where a judge or other officer connected with the administration of justice receives any undue reward to influence his behavior in office;[72] but high authorities define it as the giving or receiving of a reward to influence any official act, whether of a judicial officer or not.[73]

Mr. Bishop states that the gist of the offense of bribery is the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial, and defines the crime as "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done."[74] The crime is committed by

[69] State v. Keenan, 8 Rich. (S. C.) 456; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485. The crime of making a false oath in a bankruptcy proceeding in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1913, § 9613), is not of equal enormity with perjury, and the ancient rule of the common law requiring two witnesses to convict of perjury does not apply. Kahn v. U. S., 214 Fed. 54, 130 C. C. A. 494.

[70] State v. Shupe, supra.

[71] Com. v. Pollard, 12 Metc. (53 Mass.) 225.

[72] 4 Bl. Comm. 139. See, also, 3 Inst. 145; 2 Russ. Crimes, 122.

[73] 2 Bish. New Cr. Law, § 85; Har. Cr. Law, 84.

[74] 1 Bish. Cr. Law, § 85; STATE v. ELLIS, 33 N. J. Law, 102; 97 Am. Dec. 707, Mikell Illus. Cas. Criminal Law, 242. Bribery is the

one who gives the bribe, as well as by him who receives it. A mere present to an officer after the act is not bribery if

giving, offering, or receiving of anything of value, or any valuable service, intended to influence one in the discharge of a legal duty. 2 Am. & Eng. Encyc. Law (2d Ed.) 907. The thing offered as a bribe must be something of some value to the receiver, not something imaginary, illusive, or amounting to nothing more than the gratification of a wish or hope on his part. People v. Hyde, 156 App. Div. 618, 141 N. Y. Supp. 1089. A., a city treasurer, requested a bank with which he had deposited city funds to loan another city depository sufficient money to tide it over an investigation. The bank acceded to A.'s request under a threat by him to withdraw the city funds from it in case of a refusal. It was held that A.'s threat did not amount to a bribe, in the absence of proof that he was personally interested in the assisted bank. People v. Hyde, supra. The giving of entertainments for the purpose of unduly influencing legislation has been held not to constitute bribery. Randall v. Evening News Ass'n, 97 Mich. 136, 56 N. W. 361. The giving of a present to an officer after the act desired is not bribery, if not the result of a previous understanding. Hutchinson v. State, 39 Tex. 293. If the thing offered is of some value, it is sufficient; the amount of its value is immaterial. State v. McDonald, 106 Ind. 233, 6 N. E. 607. Bribery cannot be predicated on an offer of a reward not to perform duties for the performance of which there is no legal or constitutional warrant. U. S. v. Boyer (D. C.) 85 Fed. 425. A prisoner held under an illegal arrest cannot be convicted of offering to bribe an officer to allow him to escape. Ex parte Richards, 44 Tex. Cr. R. 561, 72 S. W. 838; Moore v. State, 44 Tex. Cr. R. 159, 69 S. W. 521. Under a statute making it a crime to offer money to a public officer with intent to influence his decision "on any matter which may by law be brought before him in his official capacity," it was held that the defendant was not guilty of the crime where he offered a member of the board of health a bribe to vote in favor of an award of a contract, the power to award which was committed to the board by an ordinance which was illegal and void; "for," said the court, "the matter could not legally come before Chapman in his official capacity." State v. Butler, 178 Mo. 272, 77 S. W. 560. Where the defendant offered the state's attorney a bribe if he would drop certain criminal proceedings, and the state's attorney, in order to trap the defendant, accepted the money, it was held that the defendant was not guilty of bribery, but could be convicted only for an attempt.

there was no prior understanding.[75] An offer of a bribe, or an offer to accept a bribe, is a crime, though probably an attempt at bribery rather than bribery.[76] A voter, in casting his vote, performs an official act; and bribery of voters is a crime at common law.[77] An offer by a candidate for a county office, made to the voters, that he would, if elected, return part of his salary into the county treasury, was held to constitute bribery;[78] though it was held otherwise where a note was given to induce the people to vote for the removal of the county seat.[79] One who conveys an offer to bribe from a third person is himself guilty, though the money is to be paid by the third person;[80] and the third person in such case is also guilty.[81] The offense is generally defined by statute.

The Criminal Code provided that whoever corruptly gives money to a state's attorney with intent to influence him in his official capacity is guilty of bribery. People v. Peters, 265 Ill. 122, 106 N. E. 513.

[75] Hutchinson v. State, 36 Tex. 293.

[76] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; STATE v. ELLIS, 33 N. J. Law, 102, 97 Am. Dec. 707, Mikell Illus. Cas. Criminal Law, 242. Cf. State v. Miles, 89 Me. 142, 36 Atl. 70.

[77] Reg. v. Lancaster, 16 Cox, Cr. Cas. 737; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808; State v. Ames, 64 Me. 386. Bribery of member of nominating convention. Com. v. Bell, 145 Pa. 374, 22 Atl. 641, 644. Offer of money to legislator to vote for candidate for United States senator is bribery at common law. State v. Davis, 2 Pennewill (Del.) 139, 45 Atl. 394.

[78] State ex rel. Newell v. Purdy, 36 Wis. 213, 17 Am. Rep. 485.

[79] Dishon v. Smith, 10 Iowa, 212.

[80] People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

[81] People v. Kerr (O. & T.) 6 N. Y. Supp. 674.

MISCONDUCT IN OFFICE

145. MALFEASANCE—It is malfeasance and a misdemeanor at common law for any public officer, in the exercise of, or under the color of exercising, the duties of his office, to do any illegal act, or abuse any discretionary power with which he is invested by law, from an improper motive. Such malfeasance may be

(a) EXTORTION—Extortion is the taking, under color of office, from any person, any money or valuable thing which is not due from him at the time when it is taken.[83]

(b) OPPRESSION—Oppression consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not amounting to extortion.[83]

(c) FRAUD AND BREACH OF TRUST—It is a misdemeanor for any public officer, in the discharge of the duties of his office, to commit any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.[84]

[83] Steph. Dig. Cr. Law, art. 119; Com. v. Bagley, 7 Pick. (Mass.) 279; State v. Burton, 3 Ind. 93; People v. Calhoun, 8 Wend. (N. Y.) 420; Loftus v. State (N. J.) 19 Atl. 183; State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Com. v. Saulsbury, 152 Pa. 554, 25 Atl. 610. Extortion distinguished from bribery. People v. McLaughlin, 2 App. Div. 419, 37 N. Y. Supp. 1005. See, also, Williams v. U. S., 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509; Levar v. State, 103 Ga. 42, 29 S. E. 467.

[83] Steph. Dig. Cr. Law, art. 119.

[84] Steph. Dig. Cr. Law, art. 121; State v. Glasgow, 1 N. C. 264, 2 Am. Dec. 629.

146. NONFEASANCE—It is nonfeasance and a misdemeanor for any public officer willfully to neglect to perform any duty which he is bound either by common law or by statute to perform, provided the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.[85]

147. REFUSAL TO ACCEPT OFFICE—It is a misdemeanor for any person unlawfully to refuse or omit to take upon himself and serve any public office which he is by law required to accept if duly appointed, provided no other penalty is imposed by law for such refusal or neglect, or the law or custom does not permit composition in place of serving.[86]

The above text applies as well to de facto as to de jure officers, for if one claims an office, and assumes to exercise the duties thereof, he must comply with the law; but it seems that it does not apply to executive officers of the government so far as they are clothed with discretion, or to the legislature, or to judges of courts of record performing judicial, as distinguished from ministerial, acts, so as to render them liable to indictment, and that the remedy against them is by impeachment. In case of abuse of discretionary power, whether there was an improper motive may be inferred either from the nature of the act or from the circumstances of the case. An illegal exercise of authority, caused by a bona fide mistake as to the law, is not criminal.

[85] Steph. Dig. Cr. Law, art. 122; State v. Kern, 51 N. J. Law, 259, 17 Atl. 114.

[86] Steph. Dig. Cr. Law, art. 123; Rex v. Bower, 1 Barn. & C. 585; 1 Russ. Crimes, 212.

An example of oppression is where a justice of the peace refuses a license to a person because of the latter's refusal to vote as the justice wishes;[87] and it is extortion for a constable to obtain money from one whom he has in custody on a warrant for assault upon color and pretense that he will procure the warrant to be discharged.[88] An example of fraud and breach of trust affecting the public is where an accountant in public office fraudulently omits to make entries in his accounts, whereby the cashier is enabled to retain moneys, and appropriate the interest thereon;[89] or where the commissary of public stores contracts with a person for supplies on condition that the latter will divide the profits with him.[90]

Where justices of the peace, whose duty it was to vote for certain officers, made a bargain or reciprocal promise each to vote for a certain candidate, this was held a crime at common law.[91] On the prosecution of an officer for negligence, it seems that mistake of law or fact is no defense, as officers must know the law and the facts necessary to enable them to act.[92] An officer is criminally liable for being drunk when in discharge of his duties.[93]

[87] Rex v. Williams, 3 Burrows, 1317.

[88] 2 Chit. Cr. Law, 292. It is extortion for a public official to demand money as a condition to allowing a just claim against a public corporation. In re Shepard, 161 Cal. 171, 118 Pac. 513.

[89] Rex v. Bembridge, 3 Doug. 332.

[90] Rex v. Jones, 31 How. St. Tr. 251.

[91] Com. v. Callaghan, 2 Va. Cas. 460.

[92] 2 Whart. Cr. Law, § 1582.

[93] Com. v. Alexander, 4 Hen. & M. (Va.) 522.

CHAPTER XIV

OFFENSES AGAINST THE PUBLIC PEACE

148. In General.
149. Dueling.
150-152. Unlawful Assembly, Rout, and Riot.
153. Affray.
154-155. Forcible Entry and Detainer.
156-157. Libels on Private Persons.

IN GENERAL

148. Any willful and unjustifiable act in disturbance of the public peace, or even which directly tends to a disturbance of the peace, if it is of sufficient magnitude for the law's notice, and does not amount to a felony, is a misdemeanor at common law.[1]

As said by Gibson, C. J.:[2] "No man has a right to trifle with the feelings of any large class of men, so as to provoke them to a breach of the peace;" therefore any intentional, unjustifiable act, done to provoke a breach of the peace, is an indictable misdemeanor at common law. Thus it was held in the case last cited that it was a misdemeanor to erect a stuffed effigy of St. Patrick in a portion of a city inhabited largely by emigrants from Ireland. So a prize fight conducted under conditions that would be likely to cause a breach of the peace is indictable.[3]

It is on this ground of a tendency to create a breach of the peace that willful disturbances of public assemblies are

[1] 1 Bish. New Cr. Law, § 533 et seq.
[2] Com. v. Haines, 4 Clark (Pa.) 17.
[3] Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328.

indictable. The indictments are usually for disturbing a religious meeting, but disturbances of any public meeting are within the rule.[4] To constitute this crime there must be an intent to disturb.[5]

But not only are acts which tend to provoke a breach of the peace on the part of numbers of persons indictable, but acts which tend to such breach by an individual are misdemeanors. Thus it has been held to be a misdemeanor to write a scandalous letter to a man concerning his fiancée;[6] to enter another man's house secretly, in the nighttime, and by loud noises disturb the family;[7] and to disturb a family by knocking loudly at the front door for a space of two hours.[8] The line drawn between cases of this kind, held to be indictable, and others, held to constitute only a civil wrong, is not clear, and all of the cases are not reconcilable.[9]

[4] Disturbance of town meeting, Com. v. Hoxey, 16 Mass. 385.

[5] State v. Linkhaw, 69 N. C. 214, 12 Am. Rep. 645. In this case defendant was indicted for disturbing a religious meeting. The evidence was that he sang the hymns in such a manner that his voice was heard at the end of each stanza after the other singers had ceased, that the church authorities had remonstrated with him, and that his reply was that he would worship, and that as part of the worship it was his duty to sing. The prosecution admitted that "he had no intention or purpose to disturb the congregation." It was held that intent to disturb was essential, and that, though intent might be presumed from his acts, yet the admission by the prosecution rebutted this presumption, and the defendant could not be convicted.

[6] Rex v. Summers, 3 Salk. 194.

[7] Com. v. Taylor, 5 Bin. (Pa.) 277.

[8] Rex v. Hood, Sayer, 161.

[9] In Com. v. Edwards, 1 Ashm. (Pa.) 46, it was held that an indictment could not be supported against a person charging him with the frequent practice of going to the house of another and grossly abusing his family, thereby rendering their lives uncomfortable. So in State v. Schlottman, 52 Mo. 164, it was held not a criminal of-

DUELING

149. It is a misdemeanor at common law [10]

(a) To challenge another to fight a duel, or

(b) To be the bearer of such a challenge, or

(c) To provoke another to send a challenge.

To constitute these crimes, no actual fighting is necessary. Provocation, however great, is no justification. As we have seen, if a duel actually takes place, and one of the parties is killed, the other is guilty of murder, and all who are present abetting the crime are guilty as principals in the second degree.[11] It is immaterial that the duel is to take place in another state.[12]

UNLAWFUL ASSEMBLY, ROUT, AND RIOT

150. UNLAWFUL ASSEMBLY—An unlawful assembly is an assembly of three or more persons

(a) With intent to commit a crime by open force, or

(b) With intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons reasonable grounds to apprehend a breach of the peace.[13]

fense to disturb the peace of a single individual by calling her opprobious names in a loud and angry manner.

[10] 2 Bish. New Cr. Law, §§ 311–317; 4 Bl. Comm. 150; 1 East, P. C. 242; 1 Hawk. P. C. 487; State v. Perkins, 6 Blackf. (Ind.) 20; State v. Farrier, 8 N. C. 487; Com. v. Lambert, 9 Leigh (Va.) 603; Com. v. Tibbs, 1 Dana (Ky.) 525.

[11] Cullen v. Com., 24 Grat. (Va.) 624; Reg. v. Young, 8 Car. & P. 644; Smith v. State, 1 Yerg. (Tenn.) 228.

[12] 2 Bish. New Cr. Law, § 315; State v. Farrier, 8 N. C. 487; Harris v. State, 58 Ga. 332.

[13] Steph. Dig. Cr. Law, art. 70; 1 Hawk. P. C. 513; State v. Stalcup, 23 N. C. 30, 35 Am. Dec. 732.

151. ROUT—A rout is an unlawful assembly which has made a motion towards the execution of the common purpose of the persons assembled.[14]

152. RIOT—A riot is

(a) An unlawful assembly which has actually begun to execute the purpose for which it assembled, by a breach of the peace, and to the terror of the public; or

(b) A lawful assembly may become a riot if the persons assembled form and proceed to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled.[15]

To constitute these crimes at common law, three persons are essential,[16] though this is changed by statute in some states.[17] If three persons meet together for the purpose of beating another who lives a mile off, there is an unlawful assembly; while they are on the road to carry out the purpose, there is a rout; and, when they make the attack and beat him, there is a riot. To constitute a riot, the object need not be unlawful, provided the acts are done in a manner calculated to inspire terror. For the Salvation Army to assemble and march through the streets might, under some circumstances, constitute a common nuisance, but it would not be an unlawful assembly, for there is no unlawful pur-

[14] Steph. Dig. Cr. Law, art. 71.

[15] Steph. Dig. Cr. Law, art. 72.

[16] Com. v. Gibney, 2 Allen (Mass.) 150; Turpin v. State, 4 Blackf. (Ind.) 72; Com. v. Edwards, 1 Ashm. (Pa.) 46. Riot may be committed where only two are engaged in the physical act, and a third is present, abetting. State v. Straw, 33 Me. 554.

[17] Dougherty v. People, 4 Scam. (Ill.) 179; Logg v. People, 92 Ill. 598; Rachels v. State, 51 Ga. 374; Stafford v. State, 93 Ga. 207, 19 S. E. 50; Dixon v. State, 105 Ga. 787, 31 S. E. 750.

pose, and the assembly is not tumultuous, nor against the peace;[18] but it is an unlawful assembly for a number of persons to meet at a house, and disguise themselves, for the purpose of going out on a poaching expedition.[19]

In a South Carolina case, where money had been staked for a prize fight, and the crowd was assembled, this was held to constitute a rout. It was said by the court: "The parties had no doubt assembled with a common intent to commit a breach of the peace. Preparations had been made for the combat, and blows only were necessary to constitute the offense of riot beyond all doubt. What degree of execution of their purpose will convert a rout into a riot it may be often difficult to determine, but this case does not require any such distinction to be made. The preparation for battle, the staking the money, will clearly make them guilty of a rout." [20]

In another South Carolina case a party of men who had assembled at night in the streets of a village, and out of fun made a great noise, by yelling, shooting firearms, and blowing horns, were convicted of riot. The court said: "If a tumultuous or noisy act be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot; as if a dozen men assemble together in a forest, and blow horns or shoot guns, or such acts, it would not be a riot. But if the same party were to assemble at the hour of midnight in the streets of Charleston or Columbia, and were to march through the streets crying 'Fire!' blowing horns, and shooting guns, few, I apprehend, would hesitate in pronouncing it a riot, although

[18] Beatty v. Gillbanks, 15 Cox, Cr. Cas. 138; Reg. v. Clarkson, 66 Law T. (N. S.) 297.

[19] Rex v. Brodribb, 6 Car. & P. 571; Reg. v. Vincent, 9 Car. & P. 109.

[20] State v. Sumner, 2 Speers (S. C.) 599, 42 Am. Dec. 387.

there might be no ordinance of the city for punishing such conduct; and why? Because such conduct in such a place is calculated to excite terror and alarm among the citizens." [21]

To constitute a riot it is not necessary that the original assembling be for an unlawful purpose; it is sufficient if, being assembled, they proceed together to the execution of an unlawful purpose in a riotous manner.[22] It is not necessary that the persons engaging in the riot should have expressly agreed among themselves as to the common design they intended to pursue.[23] The law does not distinguish between the relative degrees of violence on the part of those engaged in the riot; all who take any part therein, whether by acts, gestures, signs, or words, are principals.[24]

AFFRAY

153. An affray is the fighting of two or more persons in a public place, to the terror of the people, and is a misdemeanor.[25]

An affray differs from a riot in that there must be premeditation and at least three persons engaged to constitute a riot, whereas an affray, requires only two persons par-

[21] STATE v. BRAZIL, Rice (S. C.) 257, Mikell Illus. Cas. Criminal Law, 245. Attempt to ride a person on the rail. State v. Snow, 18 Me. 346. Congregating to prevent removal of prisoner and intimidating sheriff. Green v. State, 109 Ga. 536, 35 S. E. 97. All persons connected with the common purpose are guilty, whether their conduct is violent and tumultuous or not. Baptist v. State, 109 Ga. 546, 35 S. E. 658. See, also, Coney v. State, 113 Ga. 1060, 39 S. E. 425.

[22] State v. Snow, 18 Me. 346.

[23] People v. Judson, 11 Daly (N. Y.) 1.

[24] People v. Judson, 11 Daly (N. Y.) 1.

[25] 2 Bish. New Cr. Law, §§ 1–7.

ticipating, and may be on a sudden encounter. By the better opinion there must be actual fighting to constitute an affray; mere words, no matter how provoking or how terrifying to the public, do not amount to an affray.[26] Also it takes two to make a fight, therefore provocative words by one, followed by blows from the other, do not amount to an affray, if the one using the words does not return the blow.[27] But while words alone, or words by one followed by a blow by another, do not make an affray, words accompanied by the drawing of weapons by both parties with an intention of immediately using them is an affray, though the parties are prevented from actually using the weapons.[28] So if one person, by such abusive language toward another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow.[29]

It is not essential that both parties enter the fight willingly; if one provoke the fight by abusive words, and strike only when struck by the other, he is guilty of an affray, though he enters the combat reluctantly.[30] But to render one guilty, he must be unlawfully fighting, either by agreement, or have brought on the fight himself; merely defending himself against an attack by an adversary does not make him guilty of an affray.[31] Merely wearing and carrying

[26] O'Neill v. State, 16 Ala. 65.

[27] O'Neill v. State, supra.

[28] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

[29] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; SIMPSON v. STATE, 5 Yerg. (Tenn.) 356, Mikell Illus. Cas. Criminal Law, 246; State v. Perry, 50 N. C. 9, 69 Am. Dec. 768; State v. Fanning, 94 N. C. 940, 55 Am. Rep. 653.

[30] Pollock v. State, 32 Tex. Cr. R. 29, 22 S. W. 19; State v. Sumner, 5 Strobh. (S. C.) 53.

[31] Klum v. State, 1 Blackf. (Ind.) 377; State v. Harrell, 107 N. C. 944, 12 S. E. 439.

dangerous weapons to the terror of the people does not constitute an affray.[82] One who aids, assists, and abets an affray is guilty as a principal.[83]

To constitute an affray, the fighting must be in a public place; otherwise it is an assault and battery merely.[84] An affray differs from an assault and battery also in that consent is held in some cases to be a defense to an indictment for assault and battery,[85] whereas it is never a defense to an indictment for an affray.

It is impossible to lay down any rule as to what is a public place within the meaning of the definition of an affray. It must depend on the circumstances of each case. A field, one mile distant from the public highway, and screened from the view of the highway, has been held not to be a public place;[86] while an inclosed lot, thirty yards distant from the street of a country town, visible from the street, has been held to be a public place.[87] The fight need not

[82] SIMPSON v. STATE, 5 Yerg. (Tenn.) 356, Mikell Illus. Cas. Criminal Law, 246.

[83] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

[84] Taylor v. State, 22 Ala. 15; Carwile v. State, 35 Ala. 392; Wilson v. State, 3 Heisk. (Tenn.) 278. Two persons fighting after challenge in presence of a third. Piper v. State (Tex. Cr. App.) 51 S. W. 1113.

[85] Supra.

[86] Taylor v. State, 22 Ala. 15.

[87] Carwile v. State, 35 Ala. 392. In this case the court said: "A fight at a place so near a public street, and so circumstanced in reference to it, as was the place in this case, is attended by this distinguishing characteristic of an affray (terror to the people), and is so attended by reason of its proximity and relation to a place per se public. From a fight at such a place there may be peril to a person passing along the public street, and also a view and a hearing of all that is alarming and exciting. One upon the public street is thereby subjected to a terror identical in its cause and in its character with that which would have been produced by a fight in the street."

originate in a public place. A fight commenced in private, but carried by flight and pursuit to a place where people are assembled, is an affray.[38] It is not necessary that the fight actually cause terror to the public; if it is in a public place, terror will be presumed.[39] Therefore, if the fight be in a public place, it is immaterial whether any persons other than the combatants are present.[40] From the nature of the crime two persons are necessary; one person alone cannot commit it.[41]

FORCIBLE ENTRY AND DETAINER

154. Forcible entry is where a person violently enters upon real property occupied by another, with menaces, force, and arms, and without the authority of law.

155. Forcible detainer is detention of the possession of the property by the same kind of force, and may be either where the original entry was forcible or where it was peaceable.

Forcible entry and forcible detainer were crimes under the old common law, and were also defined and declared by early English statutes, which are the common law with us. To constitute a forcible entry, there must be more force than is sufficient to make the entry a mere trespass. Some violence must be used, or rather some apparent violence; for there may be no actual force, its place being supplied by the presence of such a number of people as to terrorize

[38] Wilson v. State, 3 Heisk. (Tenn.) 278.
[39] Carwile v. State, 35 Ala. 392.
[40] Carwile v. State, supra.
[41] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; O'Neill v. State, 16 Ala. 65.

the occupants of the premises, or by menaces and threats, reasonably leading them to believe that bodily injury will be done unless they give up the possession. Entry by a mere trick is not forcible. One may be prosecuted for forcible entry alone, or for forcible detainer, or for both.[42]

LIBELS ON PRIVATE PERSONS

156. The books differ greatly in defining libel, but, subject to qualifications hereafter stated, it may be defined generally as the malicious publication of any writing, sign, picture, effigy, or other representation tending to expose any person to hatred, contempt, or ridicule.[43]

157. The word "libel" is used to denote both the defamatory matter published and the offense of publishing it.

[42] 2 Whart. Cr. Law, § 1083; 2 Bish. New Cr. Law, § 489; HARDING'S CASE, 1 Greenl. (Me.) 22, Mikell Illus. Cas. Criminal Law, 249; Rex v. Blake, 3 Burrows, 1731; Kilpatrick v. People, 5 Denio (N. Y.) 277; Com. v. Edwards, 1 Ashm. (Pa.) 46; Com. v. Powell, 8 Leigh (Va.) 719; Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160; State v. Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844; State v. Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841. Forcible entry is a misdemeanor under a provision that offenses recognized by the common law shall be punished. Ex parte Webb, 24 Nev. 238, 51 Pac. 1027. To enter on the premises of another unlawfully, but peaceably, and keep possession by threats and menaces of physical violence to the person entitled to enter, is a criminal forcible entry and detainer. Ellis v. State, 124 Ga. 91, 52 S. E. 147. Cf. Williams v. State, 120 Ga. 488, 48 S. E. 149. Mere willful trespass upon the posted lands of another has been made a crime by statute in some jurisdictions. Com. v. Shields, 50 Pa. Super. Ct. 194.

[43] 2 Bish. New Cr. Law, § 907 et seq.; 2 Whart. Cr. Law, § 1594 et seq.; Steph. Dig. Cr. Law, art. 267 et seq.; Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212.

Libel is a misdemeanor at common law. The crime is regarded as one which affects the public peace. The law punishes publication of defamatory matter concerning another, not because of the injury to the reputation, but because it is calculated to provoke a breach of the peace.[44] The publication of defamatory matter concerning the character of a dead person is criminal if it is calculated to bring living people into hatred, contempt, or ridicule, and thus tend to lead to a breach of the peace, but not otherwise.[45] Any words or signs conveying defamatory matter marked upon any substance, and anything which by its own nature conveys defamatory matter, as, for instance, a passage in a newspaper, words written on a wall, or a gallows set up before a man's door, may be a libel. Defamatory matter is any matter which either directly or by insinuation or irony tends to expose any person to hatred, contempt, or ridicule.[46] If it has not this effect, it is not libelous.[47] To charge a person with the commission of a crime is of course, libelous. Thus it is libelous to charge a person with

[44] Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; State v. Hoskins, 60 Minn. 168, 62 N. W. 270, 27 L. R. A. 412. Since the perniciousness of libel is the tendency it has to cause breach of the peace, it has been held that one cannot be indicted for libel directed against a corporation. Com. v. Cochran, 23 Lanc. Law Rev. (Pa.) 267. Contra, State v. Boogher, 3 Mo. App. 442. Cf. State v. Williams, 74 Kan. 180, 85 Pac. 938.

[45] Rex v. Topham, 4 Term R. 126.

[46] State v. Smily, 37 Ohio St. 30, 41 Am. Rep. 487. "If a man insinuates a fact by asking a question, meaning thereby to assert it, it is the same thing as if he asserted it in terms." Alderson, B., in Reg. v. Gathercole, 2 Lewin, 255.

[47] It is not libelous to publish of a druggist that he refused to contribute with his fellow merchants for watering the street in front of his store, since such writing did not tend "to expose him to public hatred, contempt, or ridicule." People v. Jerome, 1 Mich. 142.

having voted twice at an election.[48] So to charge that a person has been convicted of a crime is a libel.[49] To publish that one's house had been searched under legal process for the discovery of stolen goods supposed to be secreted therein is libelous.[50]

It is not necessary that the libelous statement reflect upon a particular person; it may be upon a family or a class of persons.[51] As the gist of the crime is to provoke retaliation and breach of the peace, it is at common law no defense to say that the matter published was true;[52] but this rule has been very much modified by statute. As a rule, one is not criminally liable for slander or spoken words.[53]

[48] Walker v. Winn, 8 Mass. 248.

[49] State v. Brady, 44 Kan. 435, 24 Pac. 948, 9 L. R. A. 606, 21 Am. St. Rep. 296.

[50] State v. Smily, 37 Ohio St. 30, 41 Am. Rep. 487. A libelous letter is published both in the place in which it is mailed and the place to which it is addressed. People v. Bihler, 154 App. Div. 618, 139 N. Y. Supp. 819. The editor of a newspaper published in Indiana was indicted in Washington, D. C., on a charge of publishing there a libel. The basis of the charge was that the papers containing the alleged libel had been sent to and received by subscribers in Washington. It was held that there was only one publication, and that was in Indiana, not Washington. U. S. v. Smith (D. C.) 173 Fed. 227.

[51] State v. Brady, 44 Kan. 435, 24 Pac. 948, 9 L. R. A. 606, 21 Am. St. Rep. 296. In this case the statement was that a certain Governor had pardoned his brother out of the penitentiary, without specifying any particular brother. In Reg. v. Gathercole, 2 Lewin, 237, defendant was convicted of libel against a nunnery.

[52] Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; COM. v. BLANDING, 3 Pick. (Mass.) 304, 15 Am. Dec. 214, Mikell Illus. Cas. Criminal Law, 251; State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217; Com. v. Morris, 1 Va. Cas. 176, 5 Am. Dec. 515; State v. Hinson, 103 N. C. 374, 9 S. E. 552.

[53] Reg. v. Langley, 3 Salk. 190; Rex v. Penny, 1 Ld. Raym. 153.

Publication

Publication of a writing, sign, or other matter is necessary to make it a criminal libel. This may be by delivering it, sending it by mail, reading it, exhibiting it, or communicating its purport in any other manner to any person other than (perhaps) the person libeled.[54] It has been held that delivery only to the person defamed is not libel, for there is no publication.[55] But, since the gist of the offense is the tendency of the libel to provoke a breach of the peace, it seems that sending the libelous matter to the person libeled, although it reaches no third person, is a sufficient publication, and it has been frequently so held.[56] A person, to be liable for publishing a libel, must have known or had an opportunity to know its contents.[57] A libel may be published by a servant so as to render his master liable, as when a book or paper containing a libel is sold by a clerk in the regular course of business in a bookseller's shop or newspaper office.[58] Publication in a newspaper circulating in one state, but published in another, is a publication in the former.[59]

[54] Swindle v. State, 2 Yerg. (Tenn.) 581, 24 Am. Dec. 515; see Steph. Dig. Cr. Law, art. 270.

[55] State v. Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616.

[56] Reg. v. Brooke, 7 Cox, Cr. Cas. 251; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105. It is otherwise in civil libel. Sheffill v. Van Deusen, 13 Gray (Mass.) 304, 74 Am. Dec. 632.

[57] Rex v. Burdett, 4 Barn. & Ald. 95, 126; Steph. Dig. Cr. Law, art. 273.

[58] Rex v. Almon, 5 Burrows, 2686; ante, p. 132.

[59] COM. v. BLANDING, 3 Pick. (Mass.) 304, 15 Am. Dec. 214, Mikell Illus. Cas. Criminal Law, 251. One who dictates a slander to a reporter for publication is responsible for the libel if it is published. State v. Osborn, 54 Kan. 473, 38 Pac. 572.

Privileged Communications

There are some circumstances under which one has a right to publish defamatory matter, in which case the publication is said to be a privileged communication. Thus, if the defamatory matter is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing it is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, and the publication does not exceed in extent or manner what is reasonably sufficient for the occasion, the publication is privileged.[60] Such is the case where one is asked the character of his former servant by one about to engage him. He may reply to the inquiry by letter, but he cannot publish the letter in a newspaper. Other instances are where information concerning a man's character is published to a relative about to marry him, and communications in business affairs. The publication of defamatory matter is also privileged if it consist of comments on persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided such comments are fair. A fair comment is a comment which is true, or which, if false, expresses the real opinion of its author; such opinion having been formed with a reasonable degree of care and on reasonable grounds.[61] A person taking part in public affairs, publishing literary productions or works of art, or taking part in a dramatic performance or other public entertainment, submits himself, his book, picture, etc., to public criticism.[62] One may also

[60] Steph. Dig. Cr. Law, art. 273.

[61] Steph. Dig. Cr. Law, art. 274.

[62] Id.; Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; State v. Burn-

publish legislative proceedings and speeches,[62] proceedings in courts of justice,[64] and may make communications as to a candidate's character to the elective or appointive power.[65] Communications in the course of judicial proceedings are privileged if they are pertinent and material to the subject of the controversy, whether they are made by a party to the proceeding, or by his attorney, and whether they are malicious or not; but it is otherwise if they are not pertinent to the subject of the controversy.[66] An attorney may be indicted for inserting libelous matter in a pleading if it is not relevant to the controversy, and is inserted merely to annoy the party defamed, and subject him to ridicule and contempt.[67] Any abuse of the privilege renders the author of the publication criminally liable.[68]

Malice

Malice is necessary to render one criminally liable for publishing a libel, but it need not be shown that he was actuated by personal hatred and ill will towards the person libeled. No specific intent is essential. The rule that a person is deemed to intend the natural and probable consequences of his acts prevails, and the intentional publication of defamatory matter is malicious.[69] Malice is inferred

ham, 9 N. H. 34, 31 Am. Dec. 217; Com. v. Morris, 1 Va. Cas. 176, 5 Am. Dec. 515. See Carr v. Hood, 1 Camp. 355 (literary criticism); Marks v. Baker, 28 Minn. 162, 9 N. W. 678 (candidate for office).

[63] Steph. Dig. Cr. Law, art. 275.

[64] Steph. Dig. Cr. Law, art. 276; COM. v. BLANDING, 3 Pick. (Mass.) 304, 15 Am. Dec. 214, Mikell Illus. Cas. Criminal Law, 251; Com. v. Costello, 1 Pa. Dist. R. 745.

[65] Steph. Dig. Cr. Law, art. 274.

[66] Gilbert v. People, 1 Denio (N. Y.) 41, 43 Am. Dec. 646.

[67] Id.

[68] 2 Bish. New Cr. Law, § 913 et seq.; 2 Whart. Cr. Law, § 1629 et seq.

[69] Rex v. Harvey, 2 Barn. & C. 257; State v. Mason, 26 Or. 278,

from the fact of publication.[70] As we have seen, a person may be liable for a publication by his servant made without his knowledge.[71]

Other Libels

There are certain other crimes called "libels" which cannot be properly treated in this connection, as they are not punished on the ground that they tend to breaches of the peace. They are essentially different from libels against private persons, or defamatory libels, and are punished on altogether different grounds. These are blasphemous libels, obscene libels, and seditious libels. Blasphemous libels are malicious publications reviling Christianity as a religious faith, and are indictable at common law, because they tend to disturb the comfort and insult the religious convictions of the public generally, and are therefore a nuisance, and probably they are punished for the further reason that they tend to provoke retaliation, and therefore to breaches of the public peace.[72] Obscene libels are the publication of indecent and obscene books and pictures. They are punished on the ground that they tend to shock and corrupt the public morals, and are therefore common nuisances. We have already sufficiently considered this crime.[73] Seditious libels are publications tending to bring the government into contempt, or tending to expose to hatred, ridicule, or contempt foreign potentates, ambassadors, etc.[74]

38 Pac. 130, 26 L. R. A. 779, 46 Am. St. Rep. 629; Benton v. State, 59 N. J. Law, 551, 36 Atl. 1041.

[70] COM. v. BLANDING, 3 Pick. (Mass.) 304, 15 Am. Dec. 214, Mikell Illus. Cas. Criminal Law, 251; Com. v. Bonner, 9 Metc. (Mass.) 410; Pledger v. State, 77 Ga. 242, 3 S. E. 320.

[71] Ante, p. 130.

[72] Ante, p. 401; 2 Whart. Cr. Law, § 1605.

[73] Ante, p. 401; 2 Whart. Cr. Law, §§ 1606–1610.

[74] 2 Whart. Cr. Law, §§ 1611–1617.

CHAPTER XV

OFFENSES AGAINST THE GOVERNMENT

158–160. Treason and Misprision of Treason.

TREASON AND MISPRISION OF TREASON

158. "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." [1]

159. There are similar provisions in the Constitutions and statutes of the different states defining treason against the state, in the absence of which it is a common-law crime.[2]

160. MISPRISION—Every one owing allegiance, and having knowledge of the commission of treason against the United States, or, under state statutes, against the state, is guilty of misprision of treason if he conceals it, and does not as soon as may be disclose and make known the same.[3]

In England treason was divided into high and petit treason. The former embraced acts directed particularly against the sovereign; while petit treason consisted of the murder of a superior by an inferior in natural, civil, or spiritual relation, as of a husband by his wife, a master by his servant, or a lord or ordinary by an inferior ecclesiastic. What was petit treason however, is no longer recognized

[1] Const. U. S. art. 3, § 3, cl. 1; Rev. St. U. S. § 5331.
[2] 2 Whart. Cr. Law, § 1812.
[3] Rev. St. U. S. § 5333.

as treason, but these offenses are now regarded as homicide.[4]

By the ancient common law it was left very much to discretion to determine what was treason, and the judges, holding office at the pleasure of the crown, raised many offenses to treason which could be deemed such only by arbitrary construction, such as killing the king's father or brother, or even his messenger, and other acts tending to diminish the royal dignity of the crown. The grievance of these constructive treasons led in the reign of Edward III to the enactment of a statute [5] declaring and defining the different branches of treason. This statute is the basis of the law of treason in England.[6] The early statute, although it makes numerous acts treason which are not such in this country, contains words which are reproduced in the provision of the Constitution of the United States, and declares it high treason "if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere."

With us there can be no treason against the United States, except as the Constitution provides. To constitute treason by levying war, there must be war against the United States;[7] and, to constitute war, there must be an overt act of war. Conspiracy to levy war against the govern-

[4] Ante, p. 41.

[5] 25 Edw. III, St. 5, c. 2.

[6] 1 Hawk. P. C. (Curw. Ed.) p. 7, § 1; Story, Const. § 1799. See Steph. Dig. Cr. Law, arts. 51–59, and Append. note 5.

[7] See Ex parte Bollman, 4 Cranch, 75, 126, 2 L. Ed. 554; U. S. v. Burr, 4 Cranch, 469, 2 L. Ed. 684, Fed. Cas. No. 14,692a; U. S. v. Hoxie, 1 Paine, 265, Fed. Cas. No. 15,407; U. S. v. Hanway, 2 Wall., Jr. 139, Fed. Cas. No. 15,299; U. S. v. Insurgents, 2 Dall. 335, Fed. Cas. No. 15,442; U. S. v. Mitchell, 2 Dall. 348, Fed. Cas. No. 15,788; Fries' Case, Whart. St. Tr. 610, 634, Fed. Cas. No. 5,127; U. S. v. Pryor, 3 Wash. C. C. 234, Fed. Cas. No. 16,096.

ment, without any overt act of war, would not amount to treason. The war must be directed against the government. War to effect private ends is not treason. Merely forcibly to resist the law, and fire at government troops endeavoring to enforce it, is not treason, where the resistance is purely for a private purpose.[8] As said by Mr. Wharton, "the offense must be a levying war with the intent to overthrow the government as such, not merely to resist a particular statute or to repel a particular officer."[9] To constitute treason by adhering to the enemies of the United States, the enemy must be a hostile foreign power, and not merely citizens of the United States engaged in a rebellion or insurrection against them, for they are still citizens, and not enemies, within the meaning of the Constitution.[10] Any voluntary assistance given to a foreign power engaged in war with the United States is treason.[11] One who joins the enemies of his government from fear of immediate death or grievous bodily harm threatened in case of his refusal to yield is regarded as acting under compulsion, and is not guilty of treason; but a less danger, or danger to property only, will not excuse him. An alien owes a local allegiance to the sovereign in whose country he is temporarily sojourning, and may be guilty of treason against him, even by aiding his own sovereign.[12] The punishment for treason is death, or imprisonment and fine, at the discretion of the

[8] U. S. v. Hoxie, 1 Paine, 265, Fed. Cas. No. 15,407.

[9] 2 Whart. Cr. Law, § 1797.

[10] 3 Whart. Cr. Law (11th Ed.) § 2147.

[11] "If war be actually levied—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors." Marshall, C. J., in Ex parte Bollman, 4 Cranch, 75, 2 L. Ed. 554.

[12] Where one was indicted for treason in adhering to the king's

court. For misprision of treason, the punishment is fine and imprisonment. It is expressly provided by the federal Constitution that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." [13]

There may also be treason against a state, a crime which is not necessarily also treason against the United States. Treason may be committed against a state by armed opposition to its laws, or by forcibly attempting to overthrow or usurp the government. Conversely, treason against the United States, unless expressly so declared, is not an offense against the laws of a particular state. It is a crime which is directed against the national government, and exclusively cognizable in its courts.[14]

Other Similar Crimes

Among the other crimes against the United States government in the nature of, but not amounting to, treason, is seditious conspiracy; that is, a conspiracy between persons in any state or territory to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, etc. It is also a crime for any person to recruit soldiers or sailors within the United States to engage in armed hostility against the same, or to open a recruiting station within the United States for such purpose; for any person to enlist or engage within the United

enemies, it was held that naturalization by the enemy in time of war was no defense. King v. Lynch, 19 T. L. R. 163.

[13] Const. U. S. art. 3, § 3, cl. 1.

[14] People v. Lynch, 11 Johns. (N. Y.) 549; Respublica v. Carlisle, 1 Dall. (Pa.) 35, 1 L. Ed. 26. See Black, Const. Law, 518, 519; 2 Whart. Cr. Law, §§ 1812–1818.

States with intent to serve in armed hostility against the same; to incite or aid in a rebellion; and for a citizen of the United States to correspond with foreign governments with intent to influence their controversies with the United States, or to defeat the measures of the United States government.[15]

OFFENSES AGAINST THE POST OFFICE

By acts of Congress, it is a crime to intentionally or negligently obstruct the transmission or delivery of the mail; to detain letters; to destroy letters; to post obscene books; to counterfeit stamps; to commit larceny, robbery, or to embezzle from the mail; or to receive an article stolen from the mail.[16]

ABUSE OF ELECTIVE FRANCHISE

Illegal voting is a crime at common law, and is also regulated by acts of Congress and by the statutes of the different states. It is also a crime at common law for a person to usurp an office to which he has no claim, or to offer violence to voters. By statutes, betting at elections is made a crime.[17]

FORESTALLING, REGRATING, AND ENGROSSING

These were old common-law crimes consisting substantially in buying up and hoarding provisions and other products for the purpose of obtaining a monopoly, and selling them at an enhanced price. They have been abolished in

[15] 2 Whart. Cr. Law, §§ 1785–1789.
[16] 2 Whart. Cr. Law, §§ 1822–1831.
[17] 2 Whart. Cr. Law, §§ 1832–1848.

England, and have not been recognized as common-law crimes with us; but Mr. Wharton states that to obtain a monopoly of a necessary commodity for the purpose of selling for grossly extortionate prices would still be indictable at common law. Such questions generally arise in prosecutions for conspiracies, as it is in this way that monopolies are usually obtained.[18] The matter is very generally regulated by statutes.[19]

[18] Ante, p. 163.
[19] 2 Whart. Cr. Law, §§ 1849–1851.

CHAPTER XVI

OFFENSES AGAINST THE LAW OF NATIONS

161. Piracy.

PIRACY

161. Piracy is "robbery or forcible depredation on the high seas, without lawful authority, and done animo furandi, and in the spirit and intention of universal hostility. It is the same offense at sea with robbery on land."[1] Piracy is a felony.

Piracy is an offense against the law of nations, which is a part of the common law; but, as we have seen, there are no crimes punishable by the United States under the common law ex proprio vigore. The Constitution of the United States, however, gives Congress the power "to define and punish piracies and felonies on the high seas and offenses against the law of nations," [2] and Congress has passed a statute declaring that "every person who on the high seas commits the crime of piracy, as defined by the law of nations, and is afterwards brought into or found in the United States, shall suffer death." [3]

It was said by Nelson, J., in reference to the crime of piracy, on the trial of the officers and crew of the privateer Savannah: "This is defined to be a forcible depredation upon property upon the high seas without lawful authority, done animo furandi; that is, as defined in this connection,

[1] 1 Kent, Comm. 183.
[2] Const. U. S. art. 1, § 8.
[3] Rev. St. U. S. § 5368; U. S. v. Smith, 5 Wheat. 153, 5 L. Ed. 57.

in a spirit and intention of universal hostility. A pirate [under the law of nations] is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason, pirates, according to the law of nations, have always been compared to robbers; the only difference being that the sea is the theater of the operations of one, and the land of the other. And, as general robbers and pirates upon the high seas are deemed enemies of the human race—making war upon all mankind indiscriminately, the crime being one against the universal laws of society—the vessels of every nation have a right to pursue, seize, and punish them." [4]

OTHER OFFENSES

Congress has also declared it a crime for any person to violate any safe conduct or passport duly obtained or issued under authority of the United States; to assault, wound, or imprison, or in any other manner offer violence to, the person of a public minister, in violation of the law of nations; [5] to commit breaches of neutrality by serving, or setting on foot, within the United States, military expeditions, against a foreign state at peace with the United States; [6] or to forge and counterfeit, within the United States, notes, bonds, and other securities of foreign governments. [7] There are many other statutes which it would serve no useful purpose to mention specially. [8]

[4] Savannah Pirates, Warburton's Trial of the Officers and Crew of the Privateer Savannah, pp. 370, 371.

[5] Rev. St. U. S. § 4062 (U. S. Comp. St. 1913, § 7610).

[6] U. S. v. Ybanez (C. C.) 53 Fed. 536.

[7] U. S. v. Arjona, 120 U. S. 479, 7 Sup. Ct. 628, 30 L. Ed. 728.

[8] Post, p. 493.

CHAPTER XVII

JURISDICTION

162–164. Territorial Limits of States and United States.
165–168. Jurisdiction as Determined by Locality of Offense.
169–170. Federal Courts and the Common Law.
171. Jurisdiction Conferred on Federal Courts by Congress.
172–173. Persons Subject to Our Laws.

TERRITORIAL LIMITS OF STATES AND UNITED STATES

162. UNITED STATES—ON THE OCEAN—The territorial limits of the United States, regarded as one nation, extend into the ocean at least the distance of a marine league.

163. SAME—LAND BOUNDARIES—The boundaries between the United States and the countries lying adjacent are determined by treaties, under which, where the countries are divided by rivers or streams, and where they are divided by the Great Lakes, the lines have, as a rule, been run in the middle of the river, stream, or lake.[1]

164. STATES—The territorial limits of the states on the borders of the United States both on the sea and land, are, as a rule, coincident with the territorial limits of the United States. The boundaries between the states are determined, in case of the original states, by their charters and subsequent compacts, and, in case of the others, by the acts admitting them into the Union.

[1] Tyler v. People, 8 Mich. 320.

United States Limits

The territorial limits of a country, where it borders on the ocean, are determined by the law of nations, and by that law it has been held to extend outward into the ocean as far as a cannon ball will reach. This distance has been estimated as a marine league, or about three and a half English miles. "It must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast."[2] Beyond this distance the ocean is the common highway of all nations, no one nation having the right to assume control of it. The distance is measured from low-water mark on the actual shore, but from islands if they are so near the mainland that the intervening waters cannot be regarded as the high sea. Bays and other arms of the sea wholly within the territory of a country, not exceeding two marine leagues in width at the mouth, are within the territorial limit.[3] The Delaware and Chesapeake Bays, although the latter between the outside headlands is twelve miles or more wide, so that a marine league measured from each shore would not cover the entire width, are claimed to be within the territorial limits of the United States. It has even been said that the United States would have the right, if deemed necessary, to extend its jurisdiction over the adjacent waters of the ocean to lines stretching between distant headlands; as, for instance, from Cape Ann to Cape Cod, from Nantucket to Montauk Point,

[2] Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159, affirming Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820. See Reg. v. Keyn, 2 Exch. Div. 63, 13 Cox, Cr. Cas. 403.

[3] Manchester v. Massachusetts, supra.

and from the south cape of Florida to the mouth of the Mississippi river.[4]

State Limits

The states bordering on the ocean extend out, as does the United States, at least the distance of a marine league. Those on the Great Lakes extend to the boundary line between the United States and Canada. Rivers and bays extending into a state are a part of its territory. Usually, where the states are divided by rivers, the limits of each state extend to the middle of the stream; but there are exceptions in case of the Hudson river, between New York and New Jersey, the exclusive jurisdiction over which is in New York, and of the Ohio river, between Ohio and Kentucky, the whole river being in Kentucky. The states on the Mississippi river which were formed out of the Northwest Territory have concurrent jurisdiction over the whole river.[5]

County Limits

Under the common law, counties on the sea do not extend out to the state limits, but stop at the water line. Bays and other arms of the sea, however, across which objects can be reasonably discerned with the naked eye, it was de-

[4] 1 Kent, Comm. 29; 1 Bish. New Cr. Law, §§ 102–108; Tyler v. People, 8 Mich. 320. See Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 App. Cas. 394.

[5] 1 Bish. New Cr. Law, §§ 145–151; Com. v. Peters, 12 Metc. (Mass.) 387; Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820; U. S. v. Bevans, 3 Wheat. 336, 4 L. Ed. 404; U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Booth v. Shepherd, 8 Ohio St. 243; McFall v. Com., 2 Metc. (Ky.) 394; State v. Babcock, 30 N. J. Law, 29.

clared, are within county limits.[6] A state, however, may extend the limits of its counties so as to make them coincide with its own limits, and this has been done in some states. Counties bordering on the Great Lakes would probably extend at common law to the Canadian line. They are so extended by statute in New York, Virginia, and Massachusetts. Otherwise than has been stated, the boundaries of counties coincide with the state lines, where they are on the border, and the other boundaries are fixed by the acts of the Legislature.[7]

JURISDICTION AS DETERMINED BY LOCALITY OF OFFENSE

165. As a general rule, applicable to the United States, the courts of a country cannot punish a person for acts committed without its territorial limits, as the laws of a country have no extraterritorial effect, except that

EXCEPTIONS—(a) The ships of a nation are regarded as floating parts of its territory, and it may punish offenses committed thereon, wherever the ship may be.

(b) A nation has the power to punish offenses committed by its subjects abroad.

(c) A person abroad may be guilty of a crime consummated within the territorial limits of a country, as where he acts through an innocent agent, or other-

[6] See 1 Bish. New Cr. Law, § 146. Cf. Direct U. S. Cable Co. v. Anglo-American Tel. Co., supra; Com. v. Manchester, supra.

[7] 1 Bish. New Cr. Law, §§ 145–151; Manley v. People, 7 N. Y. 295; Com. v. Peters, 12 Metc. (Mass.) 387; Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820; Biscoe v. State, 68 Md. 294, 12 Atl. 25.

wise puts in motion a force which takes effect within such limits.

166. STATES—A state probably has no jurisdiction to punish for acts committed beyond its territorial limits by others than its own citizens.

167. It possibly has jurisdiction to punish acts committed by its own citizens abroad.

168. It may, like any other sovereignty, punish for acts committed without, but which take effect and constitute a crime within its limits.

Offenses on Shipboard

It is a rule of international law that vessels, whether they belong to the government itself, or to private citizens, are regarded as part of the territory of the nation under whose flag they sail, and that the country of the flag may punish for crimes committed on board, either by her own subjects or by foreigners, wherever the vessel may be. This rule, however, is subject to the qualification that if the vessel is a private one, and is in a foreign port, it is also subject to the laws of the foreign country; and crimes committed on such vessel are cognizable by the foreign country, at least if they are of a character to disturb the peace of that country, as well as by the country of the flag.[8] If those laws conflict with the laws of the flag, they will govern, and doubtless an act committed in violation of them would not be punished by the home government, though a violation of its laws. Jurisdiction to punish for offenses committed on American ships on the high seas and in foreign ports is

[8] Reg. v. Anderson, 11 Cox, Cr. Cas. 198. See Wildenhus' Case, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565.

conferred by act of Congress on the federal courts. The state courts can have no such jurisdiction.[9]

Offenses by Subjects Abroad

Under the law of nations, a country has the power to punish crimes committed by its own subjects abroad, not only in barbarous and unsettled lands, but in civilized countries as well, and this power exists whether the crime be an injury particularly to the government itself or the foreign government, or to another subject, or to a subject of the foreign government. The home government cannot go into the foreign country to arrest the offender without its consent, but this difficulty is generally obviated by treaty provisions for extradition. This power has been distinctly recognized by Congress by making it a crime for a citizen of the United States, whether in the United States or a foreign country, to correspond with any foreign government, or officer or agent thereof, with intent to influence the measures or conduct of any foreign government, or any officer or agent thereof, in relation to any disputes or controversies with the United States;[10] by making it a crime to commit perjury or subornation of perjury abroad before consular and other officers of the United States, authorized to administer oaths;[11] and by providing for consular courts abroad to punish offenses.[12]

[9] 1 Bish. New Cr. Law, § 117; U. S. v. Holmes, 5 Wheat. 412, 5 L. Ed. 122; U. S. v. Imbert, 4 Wash. C. C. 702, Fed. Cas. No. 15,438; U. S. v. Pirates, 5 Wheat. 184, 5 L. Ed. 64; U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; U. S. v. Palmer, 3 Wheat. 610, 4 L. Ed. 471.

[10] Rev. St. U. S. § 5335.

[11] Rev. St. U. S. § 4683 (U. S. Comp. St. 1913, § 8552) et seq.

[12] 1 Bish. New Cr. Law, § 121 et seq.

Same—Jurisdiction of States

Though, by the federal Constitution, the states have ceded to the United States all diplomatic authority, and can exercise none themselves, and cannot therefore be regarded as nations in the full sense of that term, yet they are sovereigns in their own territory, and with respect to matters which relate peculiarly to their own internal affairs. They retain all the rights incident to sovereignty which have not been ceded to the federal government. In view of this fact, they certainly must have some jurisdiction over their citizens abroad. Having ceded to the general government all diplomatic power, they themselves are not recognized by foreign nations,[13] and cannot protect their citizens abroad; and for this reason it is claimed that they have no right to punish them. The laws of all of the states provide for the punishment of treason against the state, which, as has been seen, is the waging of war against the state, or adhering to its enemies, giving them aid and comfort. Can it be that if a citizen of a state goes beyond its limits, and there adheres to its enemies, and wages war against it, the state is powerless to punish him when he returns into the state? Or, if a state sends an agent abroad to negotiate its bonds, can be embezzle them, and return into the state, and object to its jurisdiction to punish him? The right of a state to punish its citizens for acts committed abroad has been upheld by the courts of Virginia, Wisconsin, Texas, and, by dictum in Pennsylvania, but has been denied by those of New York, Michigan, Kentucky, Indiana, North Carolina, and New Jersey. The question, therefore, is not settled.[14]

[13] People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483.

[14] 1 Bish. New Cr. Law, § 152 et seq.; Com. v. Gaines, 2 Va. Cas. 172; State ex rel. Chandler v. Main, 16 Wis. 398; Hanks v. State, 13 Tex. App. 289; Com. v. Kunzmann, 41 Pa. 429; People v. Merrill, 2 Parker, Cr. R. (N. Y.) 590; Tyler v. People, 8 Mich. 320, 342; John-

Whether this power exists by virtue of the sovereignty of a state over its own citizens, and without an express statute to that effect, there would seem to be no reason why a state should not, by statute, make its own citizens liable to prosecution for crimes committed abroad. Such statutes exist both in England and in this country.[15]

Offenses by Foreigners Abroad—United States

As just stated, Congress has made it a crime to commit perjury or subornation before its consular and other officers abroad. It will be noticed that this applies to perjury by foreigners, as well as by subjects of the United States.

Same—States

Whether a state has power by statute to confer jurisdiction upon its courts to punish acts committed by one not a citizen, wholly in another jurisdiction, although injuriously affecting persons within the state, is doubtful, but the prevailing view is against the existence of such power.[16] By an early statute of North Carolina, residents of other states were declared punishable in North Carolina for counterfeiting its bills of credit, the same as if the offense had been committed within its limits. The North Carolina court, however, on prosecution of a citizen of Virginia for counterfeiting in Virginia, held that, if the statute could be held to apply to acts committed in another state by a citizen of such other state, it would be void, as a state could not declare

son v. Com., 86 Ky. 122, 5 S. W. 365, 9 Am. St. Rep. 269; Cruthers v. State, 161 Ind. 139, 67 N. E. 930; STATE v. CUTSHALL, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130, Mikell Illus. Cas. Criminal Law, 255; State v. Stow, 83 N. J. Law, 14, 84 Atl. 1063.

[15] See 61 Univ. of Pa. Law Rev. 317.

[16] State v. Knight, 3 N. C. 109; People v. Merrill, 2 Parker, Cr. R. (N. Y.) 590. Contra, Hanks v. State, 13 Tex. App. 289.

such acts criminal and punish them.[17] It has, however, been held by high authority that under a statute enacting that if a mortal wound is given, or other injury inflicted, without the state, whereby death ensues within the state, such offense may be punished in the county where the death happens. Thus it has been held that under such a statute a foreigner may be convicted of manslaughter of one who dies within the state from a wound inflicted on a foreign ship on the high seas.[18]

Courts Sitting in Foreign Countries

A government has the power to have its courts sit in foreign barbarous or unsettled countries, but it has such power in civilized countries only with their consent. In pursuance of treaties with China, and other countries, congress has given to United States ministers and consuls power to arraign and try all citizens of the United States charged with offenses against law committed in those countries, and has given similar power to consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States.[19]

Acts without, Taking Effect within Territorial Limits

The locality of a crime is the place where the act takes effect. As stated in the principal text, a person without the territorial limits of a country may commit a crime within

[17] State v. Knight, supra.

[18] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89. See, also, People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320. But see State v. Carter, 27 N. J. Law, 499. See, also, Reg. v. Lewis, Dears. & B. Cr. Cas. 182; State v. Kelly, 76 Me. 331, 49 Am. Rep. 620; 1 Bish. New Cr. Law, §§ 114–116. Post, p. 487.

[19] Rev. St. U. S. §§ 4084, 4088 (U. S. Comp. St. 1913, §§ 7634, 7638); In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562.

such limits. As we have seen, a person who commits a crime through an innocent agent, is guilty as a principal in the first degree; so one who is in England, Mexico, or some other country, while his agent is committing the act in the United States, is a principal in the crime in the latter place. For instance, suppose a person in England gives poison to a person there, who is ignorant of its nature, to be administered to a person in the United States, and it is there administered, and the person dies; or suppose a person in England procures an innocent agent to bring forged paper to the United States, and negotiate it. In either case he commits a crime in the United States, and may be there punished if he can be found therein or extradited. So, also, if a person, standing in Mexico or Canada, shoots a person standing in the United States, he may be punished here for the homicide, as the shot takes effect here.[20] And, conversely, if a person standing in the United States shoots a person standing in Mexico, he cannot be punished here for the homicide.[21] The same observations are applicable to the states, where acts are committed in one of them, and take effect and constitute a crime in another. Thus, if a person causes a nuisance in a stream in one state, by building a bridge or dam, or polluting the water, and it results in injury in another state, he is criminally liable in the latter state; and one who publishes a libel in one state in a newspaper which circulates in another may be prosecuted in the latter.[22]

So if one forges a paper in one state, and sends it to an innocent agent in another state to procure money on it, he

[20] Rex v. Coombes, 1 Leach, 388.

[21] U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; State v. Hall, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822.

[22] Thompson v. Crocker, 9 Pick. (Mass.) 59; COM. v. BLANDING, 3 Pick. (Mass.) 304, 15 Am. Dec. 214, Mikell Illus. Cas. Criminal Law, 251; Lindsey v. State, 38 Ohio St. 507. An Arkansas statute made

may be convicted of the crime in the latter state.[23] It has been held that one who, standing without a state, fires at a person within the state, may be convicted in the latter state of assault with intent to murder, if the bullet misses the person aimed at, but strikes within the state. The theory is that the person firing accompanies the bullet, in legal contemplation, up to the point at which it strikes.[24]

On the other hand, if a person without the territorial limits of a state procures a felony to be committed within the territorial limits by means of a guilty agent, who is responsible to the laws of the state, the procurer is only an accessary before the fact, and is amenable only to the laws of the foreign state, if at all. He is not to be deemed as constructively present in the state where the crime is committed, and cannot be punished as an accessary in that state.[25]

Homicide—Death within Limits from Blow without

Again, suppose a foreigner within the limits of a foreign country, or, what, as has been seen, is the same thing, on board a foreign vessel on the high seas, inflicts a wound, and the wounded person comes into the United States, and dies; can he be punished here? It is the act, and not the

it a crime to allow cattle to run at large. The defendant, a resident of Missouri, turned his cattle loose in that state, intending that they should wander into Arkansas, and they did so. It was held that the statute confers no jurisdiction over a nonresident turning his cattle loose outside the state. Beattie v. State, 73 Ark. 428, 84 S. W. 477.

[23] Adams v. People, 1 N. Y. 173.

[24] SIMPSON v. STATE, 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248, 44 Am. St. Rep. 75, Mikell Illus. Cas. Criminal Law, 260.

[25] State v. Moore, 6 Fost. 26 N. H. 448, 59 Am. Dec. 354; State v. Wyckoff, 31 N. J. Law, 65; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452; Johns v. State, 19 Ind. 421, 81 Am. Dec. 408. Contra, State v. Grady, 34 Conn. 118; State v. Ayers, 8 Baxt. (Tenn.) 96. And see Carlisle v. State, 31 Tex. Cr. R. 537, 21 S. W. 358; People v. Wiley, 65 Hun, 624, 20 N. Y. Supp. 445.

result of the act which determines the locality of the homicide; and if a man strikes a mortal blow in one state or country and the person struck dies in another state or country, the homicide is committed in the first.[26] Whether a statute punishing such a homicide in the state where death occurs is valid has been the subject of controversy. Mr. Bishop maintains that to punish the offender here would be contrary to the law of nations, on the ground that the homicide is committed where the fatal blow is struck, and that a country has no right to punish a foreigner for an act committed in a foreign country;[27] and this view is sustained by an English decision, under a statute making liable to punishment in England one who poisons or strikes a person upon the sea or at any place out of England, and the death from the stroke or poison occurs in England. The English court held that the statute did not apply to a foreigner striking another foreigner on an American ship on the high seas.[28] The question has several times arisen in the state courts, and is more apt to arise there. If the blow is given by a citizen of the state or other government within whose limits death occurs, the right to punish would depend on whether the state has a right to punish its citizens for acts abroad.[29] If the blow is given by a foreigner, the power to punish him must depend on what is to be deemed the locality of the homicide. The validity of such a statute has been upheld in some states upon the ground that the blow, although inflicted without the state, continues

[26] State v. Gessert, 21 Minn. 369; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; U. S. v. Guiteau, 1 Mackey (12 D. C.) 498, 47 Am. Rep. 247; Riley v. State, 9 Humph. (Tenn.) 646; People v. Gill, 6 Cal. 637; Stout v. State, 76 Md. 317, 25 Atl. 299.

[27] 1 Bish. New Cr. Law, §§ 114–116.

[28] Reg. v. Lewis, Dears. & B. Cr. Cas. 182.

[29] Ante, p. 482.

to operate, and that the wrongdoer is therefore liable for the homicide in the place where his victim dies from the continuous operation of the mortal blow; and such states where legislative authority exists punish citizens and foreigners alike for a blow without, causing death within, their limits.[80] Other courts have denied the validity of such statutes so far as they apply to foreigners, and, unless their validity is to be upheld upon some other ground than that the homicide is, under these circumstances, committed partly within the jurisdiction,[81] this conclusion appears to be sound.

Larceny—Property Stolen in One State and Brought into Another

Again, property may be stolen in one state and brought into another. Can the latter state punish the thief? It has been held from the earliest times that if a thief steals goods in one county, and brings them into another, he may be indicted in either, because his unlawful carrying in the second is deemed a continuance of the unlawful taking,—a continuing trespass,—and so all the essential elements of larceny exist in the second.[82] If, however, the original taking is abroad, and the goods are afterwards brought by the thief into England, it has been held in England not larceny, because there has been no taking against the law which is invoked to punish him.[83] In the United States the au-

[80] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89. See, also, People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320; Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436, 15 L. R. A. 226, 32 Am. St. Rep. 831; State v. Caldwell, 115 N. C. 794, 20 S. E. 523.

[81] State v. Carter, 27 N. J. Law, 499. Cf. Hunter v. State, 40 N. J. Law, 495. See, also, State v. Kelly, 76 Me. 331, 49 Am. Rep. 620. Ante, p. 486.

[82] 4 Bl. Comm. 305.

[83] Rex v. Anderson, 2 East, P. C. 772; Rex v. Prowes, 1 Moody,

thorities are not in accord. In some states it is held in accordance with the English cases that if goods are stolen in a foreign country and brought into a state the taker cannot be punished for larceny in the state into which the goods are brought.[34] Other courts hold that he can be punished in the state into which he brings the goods.[35] Where the goods are stolen in one of the United States and carried into another there is the same conflict of opinion. Some courts hold that the second state may punish for larceny,[36] while others hold that the question is the same as where the goods are stolen in a foreign country, and refuse to allow a prosecution in the state into which the goods are brought.[37] In many states statutes have been enacted providing that a person who has without the state stolen goods and who brings them into the state may be convicted of larceny.

The same conflict of authority is met with in the crime of receiving stolen goods. On principle, in the absence of statute, the goods must have been stolen within the jurisdiction of the receiving, and it has been so held in England;

Cr. Cas. 349; Reg. v. Debruiel, 11 Cox, Cr. Cas. 207; Reg. v. Carr, 15 Cox, Cr. Cas. 131, note.

[34] Com. v. Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762; Com. v. White, 123 Mass. 433, 25 Am. Rep. 116; Stanley v. State, 24 Ohio St. 166, 15 Am. Rep. 604; Lee v. State, 64 Ga. 203, 37 Am. Rep. 67.

[35] State v. Bartlett, 11 Vt. 650; State v. Underwood, 49 Me. 181, 77 Am. Dec. 254.

[36] Worthington v. State, 58 Md. 403, 42 Am. Rep. 338; Stinson v. People, 43 Ill. 397; State v. Hill, 19 S. C. 435; Watson v. State, 36 Miss. 593; State v. Johnson, 2 Or. 115; State v. Bennett, 14 Iowa, 479; Ferrill v. Com., 1 Duv. (Ky.) 153; Com. v. Cullins, 1 Mass. 116; Hamilton v. State, 11 Ohio, 435.

[37] People v. Gardner, 2 Johns. (N. Y.) 477; People v Schenck, 2 Johns. (N. Y.) 479; State v. Brown, 2 N. C. 100, 1 Am. Dec. 548; Lee v. State, 64 Ga. 203, 37 Am. Rep. 67; State v. Le Blanch, 31 N. J. Law, 82; Beal v. State, 15 Ind. 378; People v. Loughridge, 1 Neb. 11, 93 Am. Dec. 325; State v. Reonnals, 14 La. Ann. 278.

but there are decisions in this country to the contrary where the goods were stolen in another state.[88]

FEDERAL COURTS AND THE COMMON LAW

169. The federal courts have no criminal jurisdiction by virtue of the common law ex proprio vigore, and can exercise such jurisdiction only as is expressly conferred upon them by Congress.

170. Where, however, Congress has declared certain acts crimes without defining them, and conferred jurisdiction thereof, the courts may look to the common law for their definition.

This question came before the Supreme Court of the United States early in the present century. One Hudson and another had been indicted for publishing a libel on the President and Congress of the United States. No jurisdiction to punish for such an act had been conferred upon the federal Circuit Courts by any act of Congress, and the judges of the circuit in which the indictment was pending, being divided in opinion as to whether such jurisdiction existed at common law, certified the case to the Supreme Court. That court held that the indictment could not be sustained. It was said by the court: "The powers of the general government are made up of concessions from the several states. Whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions. That power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power

[88] Ante, p. 382.

of the Union. Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer." [89] The opinion then states that, before the federal courts can punish acts done by an individual in supposed violation of the peace and dignity of the United States, the legislative authority of the Union must first make the act a crime, affix a punishment, and declare the court that shall have jurisdiction of the offense; that the exercise of criminal jurisdiction in common-law cases is not within their implied powers. In view of this decision, to determine whether an act is a crime against the United States, and whether the federal courts have power to punish it, we must look to the acts of Congress; and, unless the jurisdiction be thereby conferred, it does not exist.

Common Law Supplies Definitions

Though the federal courts derive no jurisdiction from the common law, yet, where congress has conferred jurisdiction of a crime in general terms, without defining it, they may look to the common law for its definition. Thus, an act of Congress declares murder, manslaughter, rape, and other crimes upon the high seas or in certain specified places to be crimes punishable in the federal courts, but does not de-

[89] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; U. S. v. Martin (D. C.) 170 Fed. 110.

fine those crimes.[40] Their definition, therefore, must be determined by the common law of the place where the court sits.[41]

JURISDICTION CONFERRED ON FEDERAL COURTS BY CONGRESS

171. As has been stated, the federal courts have such jurisdiction only as is expressly conferred by act of Congress, and Congress can confer such jurisdiction only as is authorized by the Constitution.

We have already seen what powers the Constitution has conferred on Congress. We shall now see in a general way the extent to which it has exercised them. Mr. Wharton has collected the various provisions under five heads: (1) Offenses against the law of nations; (2) offenses against federal sovereignty; (3) offenses against the persons of individuals; (4) offenses against property; and (5) offenses against public justice.[42]

Offenses against the Law of Nations

This head includes breaches of neutrality, or hostile acts by citizens of the United States in aid of a foreign state against another foreign state which is at peace with the United States, such as serving against such a state under commission from a foreign state, or fitting out vessels within the United States to cruise against such state, or rendering other assistance within the United States by furnishing vessels or setting on foot an armed force. There are also included under this head offenses against foreign ministers

[40] Rev. St. U. S. § 5335.
[41] 1 Whart. Cr. Law, § 255.
[42] 1 Whart. Cr. Law, § 257 et seq.

or ambassadors and their servants, such as violation of passports, or violence, and suing out or executing process against them.[43]

Offenses against Federal Sovereignty

Under this head are included treason and misprision of treason, treasonable correspondence with foreign governments, and certain acts of hostility against the United States; offenses against the elective franchise; illegally holding office; offenses against Indians; offenses by subjects abroad; perjury and forgery abroad; offenses against the post office; counterfeiting; piracy; revolt; and the slave trade.[44]

Offenses against the Persons of Individuals

Under this head may be mentioned murder and manslaughter in any fort, dockyard, or other place under the exclusive jurisdiction of the United States; murder, manslaughter, or rape upon the high seas, or in any river, haven, basin or other like place out of the jurisdiction of the United States.[45]

Offenses against Property

Among these are custom house frauds; burning a dwelling house within a fort, dockyard, or other place under the jurisdiction of the United States, or any arsenal, armory, vessel, or public stores; stealing within any of the places under the exclusive jurisdiction of the United States; larceny, robbery, or embezzlement from the mails, etc.[46]

[43] Rev. St. U. S. §§ 4062, 4064, 5285, 5286 (U. S. Comp. St. 1913, §§ 7610, 7612).

[44] 1 Whart. Cr. Law, § 259, where the statutes are collected or mentioned in full.

[45] 1 Whart. Cr. Law, § 260.

[46] 1 Whart. Cr. Law, § 261.

Offenses against Public Justice

Under this head may be classed bribery of United States judges or legislators; extortion and embezzlement by public officers, and other misconduct in office; obstructing United States officers in the service of process; obstructing justice in the federal courts by intimidating, influencing, or impeding any juror, witness, or officer; and perjury in the United States courts.[47]

PERSONS SUBJECT TO OUR LAWS

172. GENERAL RULE—As a rule, all persons within the territorial limits of a country are subject to its laws, and the rule applies both to the states and the United States.

173. PERSONS EXEMPT—But under the law of nations the following persons are not responsible to our laws:

(a) Foreign friendly sovereigns and their attendants and effects.

(b) Foreign ambassadors, ministers, and diplomatic agents, with their servants and effects, but not consuls.

(c) Foreign friendly armies and navies peaceably within our territory.

(d) Enemies in war committing belligerent acts.

All persons within our territory are subject to our laws except foreign friendly sovereigns, or their representatives, and attendants, and enemies committing belligerent acts in time of war. A foreign private citizen visiting us is as

[47] 1 Whart. Cr. Law, § 262.

much amenable to the law as one of our own citizens. Foreign ministers, ambassadors, and diplomatic agents represent their sovereign, and, like him, are exempt. The rule includes secretaries of legation. Consuls, however, being mere commercial agents, are not exempt, and may be criminally liable for their acts. It is probable that a minister would forfeit his privilege if he were to be guilty of treason against our government. The exemption does not deprive one of our citizens from defending himself against an assault by a foreign minister but he may repel force by force. Foreign friendly armies or navies, if peaceably in our harbors or passing through our territory by our consent, represent their sovereigns, and are not subject to our laws; but the rule does not apply to foreign merchant vessels.[48]

[48] 1 Bish. New Cr. Law, § 124 et seq.; 1 Kent, Comm. 38 et seq.; State v. De La Foret, 2 Nott & McC. (S. C.) 217; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. Ed. 59.

CHAPTER XVIII

FORMER JEOPARDY

174. In General.

IN GENERAL

174. No man can be put twice in jeopardy for the same offense.[1]

EXCEPTION—A person may waive the right to plead former jeopardy.

It is said by Blackstone that the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the English common law: that no man is to be brought into jeopardy of his life more than once for the same offense; and hence it is allowed as a consequence that when a man is once found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime.[2] It is also said by the same commentator that the plea of autrefois convict, or a former conviction for the identical crime, though no judgment was ever given, or perhaps will be, is a good plea in bar to an indictment.[3] This was the common law. By the Constitution of the United States, however, it is provided that "no person shall be * * * subject, for the

[1] For a fuller treatment of this subject, see Clark, Cr. Proc. pp. 382–407.

[2] 4 Bl. Comm. 335.

[3] 4 Bl. Comm. 336.

same offense, to be twice put in jeopardy of life and limb";[4] and there are similar provisions in the Constitutions of the different states. These provisions are probably merely declaratory of the doctrine of the common law. Under them there need be no former acquittal or conviction to bar a subsequent prosecution for the same offense. It is sufficient if the accused has once been put in jeopardy.

What Constitutes Jeopardy

After a person has once been put upon his trial before a court of competent jurisdiction, upon an indictment or information, which is sufficient to sustain a conviction, and the jury has been charged with his deliverance, he is in jeopardy; and if afterwards for any reason the jury are discharged unnecessarily and without his consent, he is entitled to his discharge, and cannot again be tried.[5] Discharge of a prisoner by a committing magistrate, or refusal of a grand jury to indict him, does not prevent a subsequent prosecution, as there is no jeopardy.[6] Jeopardy only begins when defendant pleads to the indictment, and has been put upon his trial, and this is not until the jury has been fully impaneled and sworn.[7] At any time before

[4] Const. U. S. Amend. art. 5.

[5] Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; Price v. State, 19 Ohio, 423; STATE v. SOMMERS, 60 Minn. 90, 61 N. W. 907, Mikell Illus. Cas. Criminal Law, 264.

[6] McCann v. Com., 14 Grat. (Va.) 570; Com. v. Hamilton, 129 Mass. 479; Com. v. Miller, 2 Ashm. (Pa.) 61; State v. Whipple, 57 Vt. 637; Ex parte Clarke, 54 Cal. 412. But if the magistrate has jurisdiction to try, and takes jurisdiction, a plea of former jeopardy is good. State v. Bowen, 45 Minn. 145, 47 N. W. 650; Com. v. Sullivan, 156 Mass. 487, 31 N. E. 647.

[7] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; Stuart v. Com., 28 Grat. (Va.) 950; State v. Hastings, 86 N. C. 596; Alexander

this, the prosecution may be discontinued without prejudice to a new indictment and a prosecution thereon.[8] As soon, however, as the jury has been sworn, jeopardy begins;[9] and if, after that, the indictment is quashed, or a nolle prosequi entered the defendant is entitled to his discharge.[10]

It is essential to constitute jeopardy that the court in which the accused is put upon his trial shall have jurisdiction. If it is without jurisdiction there can be no valid conviction, and hence there is no jeopardy.[11] There must be a sufficient indictment, or the court has no authority to proceed; and therefore if the indictment is invalid, because of fatal defects in the organization or constitution of the grand jury, or because it is so defective in its allegations that a conviction will be set aside, there is no jeopardy.[12]

v. Com., 105 Pa. 1; State v. Burket, 2 Mill, Const. (S. C.) 155, 12 Am. Dec. 662.

[8] Com. v. Tuck, 20 Pick. (Mass.) 356; State v. McKee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Clarke v. State, 23 Miss. 261.

[9] Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; Morgan v. State, 13 Ind. 215; People v. Webb, 38 Cal. 467; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708.

[10] People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; O'Brian v. Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715; Com. v. Hart, 149 Mass. 7, 20 N. E. 310; Klock v. People, 2 Parker, Cr. R. (N. Y.) 676.

[11] Com. v. Peters, 12 Metc. (Mass.) 387; Weaver v. State, 83 Ind. 289; State v. Parker, 66 Iowa, 586, 24 N. W. 225; Phillips v. People, 88 Ill. 160; State v. Odell, 4 Blackf. (Ind.) 156; State v. Hodgkins, 42 N. H. 474; State ex rel. Barbee v. Weatherspoon, 88 N. C. 19; State v. Charles, 16 Minn. 474 (Gil. 426).

[12] Weston v. State, 63 Ala. 155; Kohlheimer v. State, 39 Miss. 548, 77 Am. Dec. 689; People v. Clark, 67 Cal. 99, 7 Pac. 178; Com. v. Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139; Pritchett v. State, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468.

Same—Several Sovereignties

Where the same act constitutes a distinct offense against each of several sovereignties, a prosecution by one does not necessarily bar a prosecution by the other. An act which is an offense both against a state and against the United States may be punished by both, and a plea of former jeopardy in the federal court will not be a bar to a prosecution in the state court, or vice versa.[13] The same rule has with less reason generally been applied to acts which are offenses both under municipal ordinances and under the general laws of the state.[14]

Discharge of Jury

If jeopardy has in fact once attached, the jury cannot be unnecessarily discharged without the defendant's consent without entitling him to his discharge.[15] But, if necessity arises, the jury may be discharged without this result. If, for example, a juror escapes before a verdict is rendered, or is guilty of any misconduct making it impossible to proceed with the trial, or is discovered, after being sworn, to be disqualified,[16] or becomes too ill during the trial to attend

[13] Moore v. Illinois, 14 How. 13, 14 L. Ed. 306; U. S. v. Barnhart (C. C.) 10 Sawy. 491, 22 Fed. 285; Abbott v. People, 75 N. Y. 602; Hendrick v. Com., 5 Leigh (Va.) 707; Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621. See Clark, Cr. Proc. 394.

[14] Ante, p. 497.

[15] Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; People v. Barrett, 2 Caines (N. Y.) 304, 2 Am. Dec. 239.

[16] State v. Hall, 9 N. J. Law, 256; State v. McKee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Com. v. McCormick, 130 Mass. 61, 39 Am. Rep. 423; State v. Allen, 46 Conn. 531; Stone v. People, 2 Scam. (Ill.) 326; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968 (where by reason of facts existing when jury is sworn, but not known to court, or of outside influence, jury is not impartial).

further proceedings,[17] or where the defendant himself has made it impossible for a valid verdict to be rendered, or a valid judgment entered against him,[18] he may be tried again. So, where the jury are unable to agree, and are discharged.[19] If the defendant consents to the jury's discharge, he waives his right to plead former jeopardy on a subsequent prosecution.[20]

Waiver by Defendant

The defendant may waive his right to plead former jeopardy, either expressly or impliedly; as, for instance, where the jury is discharged during the trial with his consent;[21] where no objection is made to a verdict that is so defective that judgment cannot be entered thereon;[22] where there is a mistrial, because defendant is of his own accord absent when the verdict is rendered, when he should be present;[23] where he procures a verdict or judgment to be set aside on his own motion in arrest or for a new trial;[24] or where he

[17] Gardes v. U. S., 87 Fed. 172, 30 C. C. A. 596.

[18] People v. Higgins, 59 Cal. 357.

[19] U. S. v. Perez, 9 Wheat. 579, 6 L. Ed. 165; Simmons v. U. S., supra; Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; Com. v. Cody, 165 Mass. 133, 42 N. E. 575; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; People v. Pline, 61 Mich. 247, 28 N. W. 83; Winsor v. Reg., L. R. 1 Q. B. 289. Contra, Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; Williams v. Com., 2 Grat. (Va.) 570, 44 Am. Dec. 403.

[20] See following note.

[21] Williams v. Com., 2 Grat. (Va.) 567, 44 Am. Dec. 403; State v. McKee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Stewart v. State, 15 Ohio St. 155.

[22] Wright v. State, 5 Ind. 527; Wilson v. State, 20 Ohio, 26.

[23] State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; People v. Higgins, 59 Cal. 357.

[24] Sutcliffe v. State, 18 Ohio, 469, 51 Am. Dec. 459; Clark v. State, 4 Humph. (Tenn.) 254; People v. McKay, 18 Johns. (N. Y.) 212; Lane v. People, 5 Gilman (Ill.) 305; Joy v. State, 14 Ind. 139; State

withdraws a plea of guilty by leave of court, and consents to entry of a nolle prosequi.[25]

Identity of Offenses

To sustain a plea of former jeopardy, the two offenses must be the same, according to the express provision of the Constitution. Former jeopardy for another offense, or former acquittal or conviction of another offense, is no bar. It is often a difficult question to determine whether the offenses are the same, and the decisions are not in accord.

Only the general rules can be stated, and for a full discussion the student is referred to works upon criminal procedure. (1) It is the general rule that if the crimes are so distinct, either in fact or law, that evidence of the facts charged in the second indictment would not have supported a conviction under the first, the offenses are not the same, and the second indictment is not barred. Thus, where there has been an acquittal on the ground of variance, a new indictment, in which the crime is correctly described, will lie. (2) If the charges are in fact for the same offense, though the indictment differs in immaterial circumstances, the defendant may plead his former acquittal or conviction, with proper averments to show the identity of the charges. (3) If the defendant could have been convicted, under the first indictment, of the offense charged in the second, an acquittal or conviction under the former indictment is a bar to the second. A former acquittal or conviction of an offense including a lesser offense is a bar to a subsequent prosecution for the lesser offense. (4) If the defendant could have been convicted of the offense charged in the first indictment on

v. Knouse, 33 Iowa, 365; People v. Barric, 49 Cal. 342; Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; People v. Hardisson, 61 Cal. 378; Veatch v. State, 60 Ind. 291.

[25] Ledgerwood v. State, 134 Ind. 81, 33 N. E. 631.

proof of the facts charged in the second, though he could not have been convicted of the whole of the offense charged in the second, the second indictment is barred, for the former acquittal has negatived the existence of the facts charged in the second. A former acquittal of a lesser offense which constitutes a necessary part of a higher crime is a bar to a subsequent prosecution for the higher crime. (5) By weight of authority, if the prosecuting officer elects to prosecute for an act constituting a certain offense, and the defendant is convicted of that offense, he cannot afterwards be prosecuted for the same act under aggravating circumstances which change its legal character. But if the aggravating circumstances do not intervene until after the first conviction—as where, after a conviction for assault and battery, the person assaulted dies—it is otherwise. A former conviction of a lesser offense which constitutes a necessary part of a higher crime is a bar to a subsequent prosecution for the higher crime. (6) Where the same act constitutes distinct offenses, neither an acquittal nor a conviction for one offense will bar a subsequent prosecution for the other.[26]

[26] See Clark, Cr. Proc. pp. 396–405.

TABLE OF CASES CITED

[THE FIGURES REFER TO PAGES]

A

Abbott v. People, 500.
Abel v. State, 137.
Abernethy v. Com., 197.
Abrams v. Foshee, 429.
Adair v. State, 75.
Adams v. Barrett, 242.
Adams v. People, 111, 487.
Adams v. State, 315.
Addyston Pipe & Steel Co. v. U. S., 164.
Adkinson v. State, 297.
Alberty v. U. S., 187.
Albritton v. State, 119.
Alderman v. People, 157.
Aldrich v. People, 381.
Aldrich v. Wright, 189.
Alexander v. Com., 498.
Alexander v. State, 302.
Alford v. State, 120.
Allen v. State, 14, 37, 145, 200, 205, 304, 394.
Allen v. U. S., 182, 184, 197, 199, 208, 446.
Allgood v. State, 389.
Allyn v. State, 136.
Ambrose v. State, 40.
American Ins. Co. v. Canter, 31.
American Pub. Co. v. Fisher, 31.
Ames' Case, 390.
Amos v. Com., 198.
Amos v. State, 115.
Anderson v. Com., 157, 412, 415.
Anderson v. State, 131, 233, 243, 343, 379, 425, 443.
Andre v. State, 424, 425.
Angell v. State, 212, 214.
Angelo v. People, 62.
Anon., 15, 82, 95, 300, 308, 312, 324, 326, 399, 404.
Arcia v. State, 381.
Armstrong v. State, 75.
Arnold v. Cost, 395.
Arnold's Case, 65.
Arp v. State, 100, 105.
Ash v. State, 113.
Ashbrook v. Com., 400, 404.
Ashford v. State, 302.
Ashton's Case, 214.
Askew v. State, 198.
Aszman v. State, 79.
Atkins v. State, 200.
Atkinson's Case, 332.
Atterberry v. State, 119.
Attorney General v. Broaddus, 419.
Attorney General v. Leeds, 404.
Aultman v. Waddle, 433.
Ausman v. Veal, 421.
Austin v. Carswell, 8.

B

Bagley v. People, 403.
Bailey v. State, 79, 330, 337.
Bain v. State, 100.
Baird v. State, 137.
Baker v. Barton, 270.
Baker v. Com., 182, 185.
Baker v. People, 409.
Baker v. State, 51, 109, 162, 346, 368, 381, 418, 419.
Baldwin v. Franks, 164.

[The figures refer to pages]

Baldwin v. State, 203.
Bales v. State, 311.
Balkum v. State, 254.
Ballard v. State, 259.
Bang v. State, 197.
Banks v. State, 412, 414.
Bankus v. State, 414.
Bannon v. U. S., 43.
Baptist v. State, 458.
Barber v. State, 45.
Barfield v. State, 386.
Barker v. Com., 10.
Barlow v. State, 385.
Barnard v. Com., 201.
Barnards v. State, 183, 197.
Barnes v. Com., 395.
Barnes v. State, 93, 131, 376.
Barnum v. State, 390, 395.
Barr v. People, 260.
Barr v. State, 197.
Barronet's Case, 88.
Bartholomew v. People, 79, 80.
Barton v. People, 366.
Bastable v. Little, 435.
Battle v. State, 222.
Baumer v. State, 419.
Baxter v. People, 100.
Bayliss v. People, 415.
Baysinger v. State, 385, 389.
Beach v. Hancock, 265.
Beal v. State, 490.
Bean v. People, 250.
Beard v. State, 401.
Beard v. U. S., 182, 187.
Beasley v. State, 77, 316.
Beattie v. State, 487.
Beatty v. Gillbanks, 457.
Beck v. State, 76, 137.
Beecher v. Anderson, 442.
Beecher v. People, 403.
Behler v. State, 94.
Belk v. People, 233, 238.
Bell v. State, 102, 103, 315, 387, 401.
Benbow v. State, 288.
Benge v. Com., 119.
Benson, In re, 385, 387, 393.
Benson v. State, 36.
Bentley v. Childers, 433.
Benton v. Com., 43.
Benton v. State, 314, 468.
Bergeron v. State, 303.
Berkeley v. Com., 255.
Berkowitz v. U. S., 46.
Bernhardt v. State, 79.
Berry v. State, 342.
Best v. State, 346.
Betts v. Stevens, 435.
Bibb v. State, 103.
Biggerstaff v. Com., 442.
Biggs v. State, 179, 180.
Biles v. Com., 388, 390.
Billard v. State, 341.
Billings v. State, 386.
Bird v. State, 417.
Birney v. State, 95.
Biscoe v. State, 480.
Bishop v. State, 111, 150.
Black v. State, 45, 343.
Blackburn v. State, 66, 110, 250.
Blaisdell v. Ahern, 434.
Blakely v. State, 125.
Blakeslee v. Tyler, 103.
Blanchette v. State, 288.
Bledsoe v. Com., 186.
Bleidorn v. Pilot Mountain Coal & Min. Co., 433.
Blige v. State, 258.
Bloodworth v. State, 248.
Bloom v. Richards, 26.
Bloomer v. State, 255, 279.
Bloomhuff v. State, 402.
Bloss v. Tobey, 290.
Blum v. State, 367.
Blunt v. Com., 334.
Board of Education of City of Cincinnati v. Minor, 26.
Boatright v. State, 134.
Bodiford v. State, 417.
Boetcher v. Staples, 17.
Boggus v. State, 409.
Bohannon v. Com., 183.
Bolding v. State, 270.
Bolling v. State, 67, 71, 74.
Bollman, Ex parte, 470, 471.
Bolin v. State, 344.

[The figures refer to pages]

Bone v. State, 180.
Bonfanti v. State, 74, 260.
Boody v. Keating, 9.
Booth v. Com., 343.
Booth v. Shepherd, 479.
Boston & W. R. Corp. v. Dana, 8, 9.
Boswell v. State, 67, 70, 73.
Bowen v. State, 124, 366, 370.
Bowers v. State, 241.
Bowles v. State, 170.
Bowman v. State, 180, 238.
Boyd v. Ellis, 29.
Boyd v. State, 271.
Boze v. State, 344.
Bracken v. State, 425.
Braddy v. Hodges, 435.
Bradford v. State, 312.
Bradley v. People, 399.
Bradley v. State, 71.
Bradshaw v. People, 285.
Brady v. State, 358.
Brantley v. State, 118.
Brazzil v. State, 201.
Breese v. State, 113.
Brennan v. People, 116, 117.
Brewer v. State, 355, 380.
Brice's Case, 299.
Briggs v. Com., 223.
Brinkley v. State, 70, 186.
Britt v. State, 377.
Brooks v. Com., 210, 214, 220, 226.
Brooks v. State, 331, 415.
Brotherton v. People, 75.
Brown, Ex parte, 259.
Brown v. Bigne, 434.
Brown v. Com., 66, 197, 211, 220, 244.
Brown v. People, 391.
Brown v. State, 94, 119, 123, 149, 245, 260, 261, 283, 297, 349, 417, 418.
Bruley v. Rose, 315.
Bryan v. State, 408.
Bryant v. State, 341.
Buchanan v. State, 344.
Buck v. Com., 123, 124.
Buckhannon v. Com., 81.
Buckland v. Com., 386.
Bugg v. Com., 224.
Bundy v. Maginess, 8, 17.
Bundy v. Newton, 434.
Bunfill v. People, 285.
Burge v. State, 350.
Burgess v. Territory, 196.
Burnett v. People, 216.
Burnett v. State, 171.
Burnham v. Heselton, 433.
Burns v. Com., 282, 284.
Burns v. State, 113, 125, 270.
Burrell v. State, 273.
Burrow v. State, 370.
Burton v. State, 314, 323.
Bush v. Com., 171.
Bussey v. State, 374, 377.
Butler v. Com., 389, 391.
Butler v. People, 232.
Bybee v. State, 403.
Byers v. Com., 40.
Byrne v. Kansas City, Ft. S. & M. R. Co., 434.

C

Cagle v. State, 137.
Cahill v. People, 197.
Cain v. State, 341.
Calder v. Bull, 31, 33.
Callahan v. State, 268, 350, 427.
Callan v. Wilson, 40.
Cameron, In re, 367.
Campbell v. Com., 118, 123, 221.
Campbell v. People, 197, 500.
Canada v. Com., 242.
Canton Nat. Bank v. American Bonding & Trust Co., 346.
Carlisle v. State, 487.
Carlson's License, 94.
Carmichael v. State, 407.
Carney v. State, 250.
Carotti v. State, 412, 417.
Carpenter v. People, 285.
Carr v. Hood, 467.
Carr v. State, 44, 62, 256, 257.
Carroll v. State, 134, 185, 186, 261, 234.

[The figures refer to pages]

Carter v. State, 55, 148, 199, 200, 259, 295.
Cartwright v. Green, 322.
Carwile v. State, 460, 461.
Case v. People, 442.
Castell v. Bambridge, 169.
Castillo v. State, 281.
Catlin v. Valentine, 400.
Caughron v. State, 170.
Caulkins v. Whisler, 386.
Causey v. State, 344.
Cecil v. Com., 418.
Chamberlain v. People, 446.
Champer v. State, 275.
Chandler v. Com., 64.
Chapman v. Gillet, 26.
Chapman v. State, 262, 264, 265.
Charles v. State, 245.
Cheatham v. Shearon, 399.
Cheeseman's Case, 142.
Cherry's Case, 339.
Chicago & E. I. R. Co. v. People, 83.
Chick v. State, 240.
Chinn v. State, 418.
Chisholm v. Doulton, 48, 129.
Chism v. State, 251.
Chittenden v. Com., 205.
Choice v. State, 82.
Chrisman v. State, 79.
Church of Jesus Christ of Latter Day Saints v. U. S., 31.
Circle v. State, 273.
City of Evanston v. Myers, 13.
City of Greeley v. Hamman, 38.
City of Kansas v. Clark, 38.
City of Mankato v. Arnold, 40.
City of Oshkosh v. Schwartz, 38.
City of Wilkes Barre v. Burgunder, 402.
City of Yankton v. Douglass, 40.
Claiborne v. State, 295, 395.
Clark v. Com., 170.
Clark v. State, 143, 337, 418, 501.
Clarke, Ex parte, 498.
Clarke v. State, 499.
Clay v. Schwab, 388.
Clem v. State, 114, 210.
Clements v. State, 175, 177, 374.
Click v. State, 280, 281.
Clifford v. State, 200.
Cline v. State, 372.
Coates v. People, 123.
Coates v. State, 74, 246.
Cochran v. State, 284.
Cody v. State, 353.
Coffman v. Com., 170.
Cohen v. New York, 402.
Cohen v. U. S., 86.
Colbert v. State, 301.
Cole v. People, 158.
Cole v. State, 191.
Collier v. State, 233.
Collins v. State, 110, 112, 119, 382, 417.
Collins v. U. S., 220.
Combs v. Com., 188, 291.
Combs v. McQuinn, 433.
Comer v. State, 246, 277.
Com. v. Adams, 18, 57, 194, 230, 268, 270.
Com. v. Aiello, 221.
Com. v. Alexander, 452.
Com. v. Allen, 402.
Com. v. Andrews, 382.
Com. v. Bagley, 450.
Com. v. Baird, 272.
Com. v. Baker, 118.
Com. v. Baldwin, 387.
Com. v. Bangs, 429.
Com. v. Barlow, 43, 139.
Com. v. Barnes, 183.
Com. v. Barney, 289.
Com. v. Barrett, 11.
Com. v. Barry, 322, 323, 333, 340.
Com. v. Beaman, 308.
Com. v. Bean, 381.
Com. v. Bell, 449.
Com. v. Berry, 324, 353.
Com. v. Blackburn, 46.
Com. v. Blanding, 464, 465, 467, 468, 486.
Com. v. Blodgett, 101, 281.
Com. v. Bonner, 468.
Com. v. Bowen, 167, 217.
Com. v. Boynton, 93, 362.

[The figures refer to pages]

Com. v. Bradford, 88, 90.
Com. v. Brady, 136.
Com. v. Branham, 258.
Com. v. Briant, 129, 130, 131.
Com. v. Brooks, 106, 107, 290.
Com. v. Brown, 9, 300, 322.
Com. v. Burk, 103.
Com. v. Burke, 47, 245.
Com. v. Burton, 367.
Com. v. Butler, 103.
Com. v. Butterick, 355.
Com. v. Call, 369, 411.
Com. v. Callaghan, 22, 452.
Com. v. Campbell, 53, 162, 168, 232.
Com. v. Carr, 10.
Com. v. Carter, 35.
Com. v. Chace, 308.
Com. v. Chance, 209, 212.
Com. v. Chapman, 21, 22, 36.
Com. v. Cheney, 103.
Com. v. Churchill, 22, 38.
Com. v. Clap, 462, 463, 464, 466.
Com. v. Clark, 141, 273, 444.
Com. v. Clifford, 377.
Com. v. Cline, 143.
Com. v. Clune, 112.
Com. v. Cochran, 463.
Com. v. Cody, 501.
Com. v. Coe, 367, 390.
Com. v. Coffee, 311.
Com. v. Colandro, 227.
Com. v. Collberg, 275, 453.
Com. v. Collins, 334.
Com. v. Connolly, 394.
Com. v. Cook, 233, 238, 283, 498, 499, 501.
Com. v. Cooley, 36.
Com. v. Cooper, 45, 71.
Com. v. Costello, 467.
Com. v. Costley, 168.
Com. v. Creadon, 47.
Com. v. Cruikshank, 334.
Com. v. Cullins, 490.
Com. v. Daley, 103.
Com. v. Davis, 323, 353, 432, 434.
Com. v. Dejardin, 400.
Com. v. Delaney, 191.
Com. v. Demain, 429.
Com. v. Dennis, 217.
Com. v. Devlin, 367.
Com. v. Dill, 422.
Com. v. Dimond, 349.
Com. v. Dingman, 316.
Com. v. Doane, 89, 344.
Com. v. Donahue, 274.
Com. v. Dougherty, 271.
Com. v. Downing, 118.
Com. v. Drew, 136, 223, 366, 370.
Com. v. Drum, 46, 182, 208, 212.
Com. v. Duane, 4.
Com. v. Duncan, 258.
Com. v. Eastman, 157.
Com. v. Eberle, 161.
Com. v. Eckert, 383.
Com. v. Edison, 445.
Com. v. Edwards, 454, 456, 462.
Com. v. Eichelberger, 335.
Com. v. Eisenhower, 170.
Com. v. Elwell, 412, 414.
Com. v. Emmons, 94.
Com. v. Eyre, 264.
Com. v. Feeney, 103.
Com. v. Fields, 245, 261.
Com. v. Filburn, 125, 439.
Com. v. Finn, 14, 315.
Com. v. Flagg, 152, 153.
Com. v. Flannelly, 92.
Com. v. Flynn, 322.
Com. v. Follansbee, 430.
Com. v. Fortune, 113, 119.
Com. v. Foster, 355, 359, 386, 387, 389.
Com. v. Fox, 171.
Com. v. Fritch, 71.
Com. v. Gable, 45.
Com. v. Gaines, 483.
Com. v. Galligan, 136.
Com. v. Gannett, 109.
Com. v. Gardner, 28, 32.
Com. v. Gerade, 75.
Com. v. Gibney, 456.
Com. v. Gillespie, 131.
Com. v. Glover, 298, 299.
Com. v. Goodman, 93.
Com. v. Grady, 370.
Com. v. Grant, 446.

[The figures refer to pages]

Com. v. Graves, 52.
Com. v. Green, 148, 251.
Com. v. Greene, 315, 343.
Com. v. Hackett, 53, 170.
Com. v. Hadley, 101, 136.
Com. v. Haines, 453.
Com. v. Hamilton, 498.
Com. v. Harrison, 74.
Com. v. Hart, 499.
Com. v. Has, 51.
Com. v. Hawkins, 76, 81, 241, 268.
Com. v. Hayden, 96.
Com. v. Hayes, 128, 131.
Com. v. Hays, 358.
Com. v. Hazlewood, 309.
Com. v. Heath, 66.
Com. v. Henry, 366, 395.
Com. v. Hersey, 53, 55.
Com. v. Hill, 111.
Com. v. Hinds, 391.
Com. v. Hodgkins, 429.
Com. v. Hollister, 118, 120.
Com. v. Holmes, 128.
Com. v. Houle, 131.
Com. v. Hoxey, 24, 454.
Com. v. Hoyer, 136.
Com. v. Hudson, 52.
Com. v. Hunt, 154, 155, 160.
Com. v. Hurley, 131.
Com. v. Hussey, 414.
Com. v. Isaacs, 412, 415.
Com. v. Jackson, 213.
Com. v. Jacobs, 144, 357.
Com. v. Jacobus, 400.
Com. v. James, 322.
Com. v. Jeandell, 26.
Com. v. Jeffries, 367.
Com. v. Jones, 415.
Com. v. Joslin, 131.
Com. v. Judd, 155, 159.
Com. v. Keller, 355.
Com. v. Kelley, 134, 135.
Com. v. Kennard, 273.
Com. v. Kennedy, 140, 145.
Com. v. Kimball, 136.
Com. v. King, 324.
Com. v. Kingsbury, 46, 139.
Com. v. Knapp, 112, 123, 127.
Com. v. Kneeland, 26.
Com. v. Knowlton, 22.
Com. v. Knox, 35.
Com. v. Kunzmann, 483.
Com. v. Ladd, 395.
Com. v. Lafferty, 412.
Com. v. Lambert, 455.
Com. v. Lane, 409.
Com. v. Langley, 372.
Com. v. Lannan, 322, 323, 326.
Com. v. Leach, 22.
Com. v. Lee, 369.
Com. v. Leonard, 380, 381.
Com. v. Lester, 327, 351.
Com. v. Libbey, 355, 359.
Com. v. Light, 380.
Com. v. Linn, 401.
Com. v. Loud, 499.
Com. v. Lowrey, 298.
Com. v. Luckis, 338.
Com. v. Lynn, 274.
Com. v. McDonald, 143.
Com. v. McCormick, 500.
Com. v. McCulloch, 434.
Com. v. McAfee, 271.
Com. v. McDonough, 32.
Com. v. McDuffy, 369.
Com. v. McHale, 24, 449.
Com. v. McHugh, 435.
Com. v. McKie, 256.
Com. v. McLaughlin, 233.
Com. v. Macloon, 485, 489.
Com. v. Macomber, 43.
Com. v. McPike, 170.
Com. v. Makely, 291.
Com. v. Malone, 191.
Com. v. Manchester, 478, 479, 480.
Com. v. Manson, 155.
Com. v. Marchand, 32.
Com. v. Marshall, 4.
Com. v. Mash, 96, 97, 410, 413.
Com. v. Mason, 342.
Com. v. Matthews, 233.
Com. v. Mead, 62.
Com. v. Merriam, 136.
Com. v. Merrill, 260, 261.
Com. v. Meyers, 400.
Com. v. Miles, 444.

[The figures refer to pages]

Com. v. Miller, 400, 405, 498.
Com. v. Milliman, 402.
Com. v. Mink, 42, 56, 212, 217, 231.
Com. v. Mohn, 401.
Com. v. Moore, 103, 168, 363.
Com. v. Morgan, 132.
Com. v. Morrill, 15, 371.
Com. v. Morris, 464, 467.
Com. v. Morse, 139.
Com. v. Mosler, 69, 71, 221.
Com. v. Mott, 38.
Com. v. Munsey, 103.
Com. v. Munson, 417.
Com. v. Murphy, 5, 57, 92, 94, 95, 246.
Com. v. Mycall, 394.
Com. v. Myers, 161.
Com. v. Neal, 102.
Com. v. Newell, 43, 45, 242, 302.
Com. v. Nichols, 129, 131, 134.
Com. v. Nickerson, 12, 277, 280, 281, 282.
Com. v. O'Brien, 367, 371.
Com. v. O'Hara, 314.
Com. v. O'Kean, 93.
Com. v. O'Malley, 324, 327, 353.
Com. v. Parker, 11, 276, 364, 429.
Com. v. Passmore, 402.
Com. v. Pease, 440.
Com. v. Peaslee, 140, 153.
Com. v. Perry, 131, 406.
Com. v. Peters, 479, 480, 499.
Com. v. Phelps, 223.
Com. v. Phillips, 33, 123.
Com. v. Pierce, 233.
Com. v. Pollard, 445, 447.
Com. v. Posey, 292.
Com. v. Powell, 6, 462.
Com. v. President, etc., of Swift Run Gap Turnpike Co., 83.
Com. v. Prius, 157.
Com. v. Proprietors of New Bedford Bridge, 83, 84, 86.
Com. v. Pulaski County Agricultural & Mechanical Ass'n, 84, 85.
Com. v. Purchase, 501.
Com. v. Putnam, 409.
Com. v. Randall, 269, 270.
Com. v. Randolph, 152, 153.
Com. v. Ray, 385, 392.
Com. v. Raymond, 93.
Com. v. Reardon, 412.
Com. v. Reed, 406.
Com. v. Renzo, 70, 73.
Com. v. Ribert, 273.
Com. v. Robinson, 281.
Com. v. Roby, 45.
Com. v. Rogers, 67, 69, 74.
Com. v. Roosnell, 246.
Com. v. Rourke, 311.
Com. v. Rubin, 343.
Com. v. Russell, 395.
Com. v. Ryan, 320, 325.
Com. v. Sankey, 388.
Com. v. Saulsbury, 450.
Com. v. Schall, 42.
Com. v. Searle, 396.
Com. v. Seed, 269.
Com. v. Sharpless, 400.
Com. v. Shaw, 314, 339.
Com. v. Shields, 462.
Com. v. Shortall, 102.
Com. v. Slattery, 9.
Com. v. Smith, 14, 93, 162, 349, 350.
Com. v. Snow, 422.
Com. v. Speer, 362.
Com. v. Spink, 158.
Com. v. Stahl, 402.
Com. v. Stearns, 359.
Com. v. Stebbins, 89, 344.
Com. v. Steimling, 312, 313.
Com. v. Stephenson, 296, 388, 389.
Com. v. Stevens, 94, 114.
Com. v. Steward, 295.
Com. v. Stone, 365.
Com. v. Stratton, 11, 256, 257, 277.
Com. v. Strupney, 295.
Com. v. Sullivan, 498.
Com. v. Superintendent of Philadelphia County Prison, 315.
Com. v. Surles, 430.
Com. v. Taylor, 143, 454.
Com. v. Thomas, 422.
Com. v. Thompson, 96, 97, 233, 413, 414.

[The figures refer to pages]

Com. v. Tibbetts, 143, 158, 160.
Com. v. Tibbs, 455.
Com. v. Tilton, 402.
Com. v. Titus, 330.
Com. v. Tobin, 315.
Com. v. Tuck, 499.
Com. v. Tuckerman, 354.
Com. v. Uprichard, 490.
Com. v. Upton, 400, 404.
Com. v. Wachendorf, 131, 134, 135.
Com. v. Waite, 27, 93.
Com. v. Walden, 55, 384.
Com. v. Walker, 47.
Com. v. Wallace, 364.
Com. v. Ward, 389.
Com. v. Wardell, 401.
Com. v. Ware, 199.
Com. v. Warren, 5, 8, 22, 157, 361.
Com. v. Waterman, 161.
Com. v. Webb, 7, 399.
Com. v. Webster, 172, 208, 215, 221, 222, 225.
Com. v. Weiss, 93.
Com. v. Welch, 394.
Com. v. Wentworth, 93.
Com. v. Wheeler, 75.
Com. v. Whitcomb, 369.
Com. v. White, 262, 264, 265, 348, 377, 378, 379, 382, 490.
Com. v. Wilde, 327, 334.
Com. v. Wilkinson, 403.
Com. v. Willard, 114.
Com. v. Williams, 137, 358.
Com. v. Wood, 271, 430.
Com. v. Wright, 428.
Com. v. Wyman, 32, 355.
Com. v. York, 210, 215.
Com. v. Young, 355.
Com. v. Zelt, 94.
Coney v. State, 458.
Conn v. People, 260.
Connaughty v. State, 114.
Conner v. State, 177, 335.
Conners v. State, 243.
Connor v. People, 12, 13, 335, 377.
Connors v. State, 273.
Cook v. State, 208, 412, 419.
Cook v. U. S., 83.
Cooper's Case, 191.
Corbett v. State, 397.
Corey v. People, 185.
Cornelison v. Com., 258.
Cornwell v. Association, 142.
Cosby v. Com., 259.
Coslet's Case, 338.
Couch v. Com., 283.
Cowen v. People, 370.
Cowley v. State, 265.
Cox v. People, 153.
Cox v. State, 393.
Coy, In re, 34.
Crabtree v. State, 94.
Craig v. State, 183.
Crane v. Com., 201.
Crawford v. State, 185, 189, 377, 389, 395.
Creed v. People, 288.
Creek v. State, 198, 200.
Creighton v. Com., 182, 184, 223.
Criswell v. State, 341.
Crocheron v. State, 324.
Crockford v. State, 307.
Croghan v. State, 427.
Croom v. State, 214, 223.
Crosby v. Leng, 9.
Crosby v. People, 148, 260.
Cross v. People, 127.
Cross v. State, 274.
Crosswell v. People, 245, 246, 249.
Crowder v. State, 191.
Crum v. State, 170, 322.
Crump v. State, 356.
Crump's Case, 155, 158, 160.
Cruthers v. State, 484.
Cullen v. Com., 455.
Culp v. State, 310.
Cummings v. Com., 340.
Cummings v. Missouri, 33.
Cummins, In re, 15, 371.
Cunningham v. People, 391.
Cunningham v. State, 67.
Curkendall v. People, 289.
Curtis v. State, 53.
Cutler v. State, 254.

[The figures refer to pages]

D

Dacey v. People, 71.
Dahms v. Sears, 434.
Dale v. State, 337, 340.
Damarest v. Haring, 152.
Danforth v. Streeter, 434.
Daniels v. People, 418.
Darrow v. Family Fund Soc., 216.
Davenport v. Com., 280.
Davidson v. Com., 252.
Davidson v. State, 136, 208, 443.
Davies v. State, 278.
Davies v. Stowell, 433.
Davis v. Com., 409.
Davis v. People, 220.
Davis v. State, 32, 70, 102, 103, 141, 145, 151, 241, 250, 259, 260, 272, 277, 436.
Davis v. U. S., 75.
Davison v. People, 182, 188.
Dawson v. Coffman, 22.
Dawson v. Com., 376.
Dawson v. State, 79.
Dean v. State, 271.
De Florin v. State, 402.
De Groat v. People, 419.
Delafoile v. State, 270.
Delany's Case, 292.
Delaware Division Canal Co. v. Com., 84, 309.
Delk v. State, 346.
Dempsey v. People, 123.
Denman v. State, 171.
Dennis v. People, 296.
Dennison v. State, 219.
Dickey v. McDonnell, 151, 276.
Dignowitty v. State, 346.
Dilger v. Com., 176, 214.
Direct U. S. Cable Co. v. Anglo-American Tel. Co., 479, 480.
Dishon v. Smith, 449.
Dixon v. State, 456.
Doan v. State, 112.
Dobb's Case, 54, 302.
Dolan v. State, 196.
Dollarhide v. U. S., 258.
Donahoe v. Richards, 26.
Donahoe v. State, 341.
Donaldson v. Mississippi & M. R. Co., 83.
Don Moran v. People, 243, 247, 248, 249.
Donnelly v. Harris, 274.
Donohoo v. State, 295.
Donolly's Case, 375.
Doss v. People, 322.
Doss v. State, 337, 340.
Dotson v. State, 410.
Dougherty v. People, 456.
Douglass v. State, 399.
Doyle v. State, 374.
Drennan v. People, 43, 223.
Drew v. State, 189.
Drinkhorn v. Bubel, 272.
Drysdale v. State, 204.
Ducher v. State, 298.
Duffey's Case, 115.
Dugdale v. Reg., 139.
Dukes v. State, 349.
Duncan v. Missouri, 34.
Duncan v. State, 35, 95, 199, 200.
Dunn v. People, 66.
Dunne v. Herrick, 434.
Durand v. People, 377.
Duthey v. State, 226.
Dyson v. State, 183.

E

Eberhart v. State, 244, 249.
Eberling v. State, 281.
Eckels v. State, 338, 339, 343.
Edmond's Case, 301.
Edmonds v. State, 338, 339, 343.
Edmonson v. State, 120.
Edwards v. State, 104, 127, 255.
Eggart v. State, 430.
Ellenbecker v. District Court, 29.
Elder v. People, 181.
Elizando v. State, 120.
Ellis v. People, 327.
Ellis v. State, 208, 250, 405, 462.
Elmore v. State, 389.
Elsey v. State, 396.
Emig v. Daum, 291.
Engelhardt v. State, 76.
Engeman v. State, 109.

[The figures refer to pages]

Enright v. People, 197.
Erickson v. Lyon, 433.
Erwin v. State, 181, 219.
Eskridge v. State, 241.
Espalla v. State, 397.
Estell v. State, 57, 230, 232.
Estep v. Com., 186, 191, 205.
Estes v. Carter, 37.
Etheridge v. State, 359.
Evans v. Com., 258.
Evans v. People, 167.
Evans v. State, 210.
Evers v. State, 226.
Eversole v. Com., 187.

F

Fair, In re, 101.
Fairy v. State, 315.
Fanning v. State, 374, 376.
Fantroy v. State, 197.
Farbach v. State, 94.
Farley v. Geisheker, 33.
Farmer v. People, 93.
Farmer v. State, 180, 269, 384.
Farrell v. State, 246.
Faulkner v. Territory, 75.
Faulks v. People, 94.
Felker v. State, 260.
Fennell v. State, 421.
Ferens v. O'Brien, 314.
Ferguson v. State, 115, 295, 296.
Ferrell v. State, 81.
Ferrill v. Com., 490.
Ferris v. Higley, 31.
Field v. Com., 198.
Files v. State, 338.
Filkins v. People, 258, 273.
Finch v. Com., 296.
Findlay v. Bear, 309.
First Nat. Bank v. Yankton County, 31.
Fisher v. People, 74.
Fisher v. State, 77, 300.
Fitzgerald v. State, 182, 359.
Flaherty v. Thomas, 32.
Flanagan v. People, 66, 70, 73.
Flanigan v. People, 76.
Fleener v. State, 10, 360.
Fletcher v. People, 271, 279.
Floyd v. State, 269, 272, 278, 279.
Flynn v. State, 350.
Fogarty v. State, 70, 74.
Fonville v. State, 76.
Fort v. State, 341.
Fortenberry v. State, 183.
Foster v. Com., 251.
Foster v. People, 241.
Fowler v. State, 401.
Fox v. State, 413.
Foy v. Cochran, 433.
Francisco v. State, 279.
Franco v. State, 298.
Franklin v. State, 204.
Fray's Case, 229.
Freel v. State, 104.
Freeman v. People, 66, 68.
French v. People, 136.
French v. State, 77.
Friederich v. People, 225.
Fries' Case, 470.
Fry v. State, 224.
Fullwood v. State, 131.
Funderburk v. State, 384.
Fussell v. State, 200.
Futch v. State, 179.

G

Gabrielson v. Waydell, 272.
Gaines v. Com., 200.
Gaines v. State, 401.
Galbraith v. State, 262.
Gallagher v. State, 272.
Gallery v. State, 198, 260.
Gann v. State, 222.
Gannon v. People, 502.
Gardes v. U. S., 501.
Garner v. State, 79.
Garrett v. Greenwell, 384.
Garrett v. State, 291, 406.
Gary v. Northwestern Mut. Life Ass'n, 357.
Gaunt v. State, 413, 416.
Gay v. State, 400.
Geist v. U. S., 156.
Gentry v. State, 304.
George v. Gobey, 134.

[The figures refer to pages]

Georgia v. Kepford, 339, 343.
Gettinger v. State, 338, 344.
Gibbons, Case of, 297.
Gibbons v. People, 34.
Gibbons v. Pepper, 267.
Gibbs v. Dewey, 436.
Gibson v. State, 155, 162, 200, 444.
Gilbert v. People, 467.
Gilbert v. State, 260.
Givens v. Com., 12, 277.
Glacken v. Com., 364.
Gladney v. State, 258.
Glover v. Com., 150.
Godfrey v. People, 241.
Godfrey v. State, 63.
Goetz v. State, 94.
Goins v. State, 114, 119, 123, 124, 161, 239, 295.
Golden v. State, 198.
Golden Gate Consol. Hydraulic Min. Co. v. Superior Court, 87.
Golliher v. Com., 211, 212, 233.
Gooch v. State, 341.
Goodrich v. People, 399.
Goodspeed v. Fuller, 433.
Gordon v. Gordon, 413.
Gordon v. State, 95.
Gore's Case, 97, 194, 212.
Gossett v. State, 179.
Grace v. State, 216, 217.
Graham v. McReynolds, 433.
Graham v. People, 372.
Graham v. State, 224.
Grainger v. State, 198.
Grand Jury, In re, 165.
Granger v. State, 226.
Graves v. State, 347.
Gray v. Combs, 189.
Green v. State, 261, 349, 458, 488.
Greene, In re, 164.
Greer v. Wintersmith, 433.
Gregg v. State, 348.
Gregory v. State, 111, 389.
Greschia v. People, 186, 188, 196.
Grey's Case, 210, 231.
Griffin v. State, 142.
Griffith v. State, 121.
Grisham v. State, 401.
Groves v. State, 123, 142.
Grubb v. State, 75.
Guardians of the Poor v. Green, 22.
Guest v. State, 343, 346.
Guetig v. State, 73.
Guffee v. State, 192.
Guiteau's Case, 68.
Gunter v. State, 74.
Gutchins v. People, 391.

H

Hadden v. People, 12, 277, 280, 281.
Hadfield's Case, 67.
Hagan v. State, 239.
Hagar v. State, 393.
Hager v. Thomas, 7.
Haile v. State, 79.
Hairston v. State, 55, 162, 255, 260.
Halbrook v. State, 408.
Hale v. State, 389, 395.
Haley v. State, 333.
Hall v. Com., 366.
Hall v. People, 349.
Hall v. State, 198, 258, 259, 260, 344, 417.
Hall's Case, 402.
Halsted v. State, 93.
Hamilton v. People, 88, 117, 259.
Hamilton v. State, 143, 346, 490.
Hamlin v. Com., 435.
Handley v. State, 44, 176.
Hankins v. People, 40.
Hanks v. State, 483, 484.
Harding's Case, 462.
Hardtke v. State, 250.
Haring v. State, 402.
Harkins v. State, 279.
Harrel v. State, 125.
Harrington v. Mills, 309.
Harris v. State, 186, 333, 455.
Harrison v. People, 338.
Harrison v. State, 183, 188, 296.
Hart v. Albany, 403.
Hartman v. Com., 8.
Hartung v. People, 32.
Harvey v. State, 261, 302.

[The figures refer to pages]

Harvick v. State, 54, 303.
Hash v. Com., 201, 202, 203.
Hasson v. Com., 200.
Hatchard v. State, 430, 431.
Hatchett v. Com., 123.
Hathaway v. State, 205.
Hawkins v. State, 395, 459, 460, 461.
Hayes v. People, 407.
Hayes v. State, 57.
Haygood v. State, 283.
Hayne's Case, 307.
Haynes v. State, 182.
Haynes' Case, 315.
Hays v. People, 254, 277.
Hays v. State, 136.
Haywood v. State, 308.
Hazen v. Com., 155, 158.
Head v. Martin, 176.
Head v. State, 80.
Heard v. State, 291.
Heath v. State, 95.
Hedley, Ex parte, 358.
Heeg v. Licht, 390.
Heigho, Ex parte, 169.
Heilman v. Com., 252.
Helfrich v. Com., 412.
Helm v. State, 200.
Hemingway v. State, 356.
Henderson v. Com., 6, 462.
Henderson v. People, 284.
Henderson v. State, 183, 289, 340, 386.
Hendrick v. Com., 500.
Hendricks v. State, 389.
Hendrickson v. Com., 169.
Hendrix v. State, 274.
Hendry v. State, 344.
Henry v. State, 145, 265, 315.
Henson v. State, 182.
Heritage v. Dodge, 270.
Herman v. People, 46.
Heron v. State, 385.
Hess v. State, 388.
Hewlett v. George, 270.
Hicks v. Com., 153.
Higgins v. Com., 281, 283, 285.
High v. State, 241.
Higler v. People, 363.
Hild v. State, 296.
Hildebrand v. People, 328, 335.
Hill v. State, 46, 62, 79, 119, 268, 346, 350, 374, 388, 403.
Hilmes v. Stroebel, 114.
Hiltabiddle v. State, 252.
Hilton's Case, 169.
Hinkle v. State, 271.
Hitchcock v. Baker, 437.
Hittner v. State, 201.
Hoch v. People, 446.
Hodge v. State, 75.
Hodgkins v. State, 275.
Holden v. Minnesota, 32.
Holland v. State, 299, 430.
Hollingsworth v. State, 357, 359.
Holly v. State, 312.
Holmes v. State, 271.
Holmes' Case, 290.
Holt v. State, 211.
Holtz v. State, 161.
Home Lumber Co. v. Hartman, 359.
Hong Shen, Ex parte, 40.
Honselman v. People, 421.
Hood v. State, 409, 411.
Hooker v. Com., 289.
Hooks v. State, 179, 196, 224.
Hooper v. State, 388.
Hoover v. State, 420.
Hope v. Com., 310.
Hope v. People, 374.
Hopps v. People, 71.
Hopt v. Utah, 33, 79.
Hornish v. People, 66.
Horton v. State, 15.
Hoskins v. Tarrence, 312.
Howard v. State, 226.
Hoy v. State, 182.
Huber v. State, 244.
Huffman v. Com., 119.
Huggett's Case, 222.
Hughes v. Com., 389.
Hughes v. State, 122, 126.
Hughes' Case, 375.
Hunt, Ex parte, 32.
Hunt v. Adams, 393.

[The figures refer to pages]

Hunt v. State, 316.
Hunt's Case, 330.
Hunter v. Com., 46.
Hunter v. State, 145, 303, 399, 489.
Hunter v. U. S., 412.
Hurd v. People, 221.
Hurley v. State, 309.
Huston v. People, 247.
Hutchinson v. State, 401, 448, 449.
Hutchison v. Com., 314.
Hutton v. State, 270.

I

Illinois Land & Loan Co. v. Speyer, 433.
Ingalls v. State, 79, 128.
Ingram v. State, 43.
Inwood v. State, 40.
Irby v. State, 63.
Isaac's Case, 291.

J

Jackson v. People, 365.
Jackson v. State, 148, 176, 177, 179, 258, 259, 261, 312, 324.
James v. Com., 22, 401.
Jameson v. State, 340.
Jaquith v. Royce, 39.
Jardine v. Cornell, 271.
Jeff's Case, 260.
Jellico Coal Min. Co. v. Com., 88.
Jenkins v. State, 258, 292, 324, 380.
Jennings v. Com., 212, 423.
Jennings v. State, 445.
Jesse v. State, 292.
John v. State, 281.
Johns v. State, 487.
Johnson v. Com., 483.
Johnson v. Patterson, 189, 190.
Johnson v. People, 37.
Johnson v. State, 149, 158, 168, 201, 204, 212, 256, 257, 264, 270, 271, 341, 370, 418.
Johnson's Case, 294.
Johnston v. Com., 295, 298.
Jolly v. U. S., 311.
Jones, Ex parte, 226.
Jones v. Com., 79, 376.
Jones v. Fortune, 206, 272.
Jones v. People, 224.
Jones v. Rice, 441.
Jones v. State, 37, 64, 80, 149, 184, 196, 223, 261, 324, 362, 416, 426, 427.
Josephine v. State, 122.
Joy v. State, 501.
Jules v. State, 369.
Junod v. State, 312.

K

Kahn v. U. S., 447.
Kansas City v. Neal, 38.
Kauffman v. People, 285.
Keely v. State, 346.
Keenan v. Com., 79.
Keeton v. Com., 79.
Keil, Ex parte, 280.
Keir v. Leeman, 441.
Keller v. State, 4, 34, 36.
Kelley v. State, 77.
Kellogg v. State, 332, 333.
Kelly, In re, 281.
Kemp v. State, 262.
Kendall v. Com., 189.
Kendrick v. State, 198.
Keneval v. State, 408.
Kennedy v. State, 314.
Kent v. People, 215.
Kent v. State, 296.
Kenyon v. People, 423, 424, 427.
Kessler v. Com., 115, 251.
Ketchell v. State, 367.
Key v. Vattier, 434.
Kieffer, Ex parte, 28.
Kilpatrick v. Com., 221.
Kilpatrick v. People, 6, 462.
Kimmel, In re, 28.
King v. Lynch, 472.
King v. People, 401.
King v. State, 75, 79, 93, 249, 386.
Kingen v. State, 182.
Kinnebrew v. State, 109.
Kinney v. People, 200.
Kirby v. Foster, 274.

[The figures refer to pages]

Kirby v. State, 162.
Kirland v. State, 257.
Kitchens v. State, 241.
Klein v. State, 262, 264, 265.
Kline, In re, 32.
Klock v. People, 499.
Klum v. State, 459.
Kneffler v. Com., 402.
Knotts v. State, 295.
Knowles v. State, 401.
Knox County v. Hunolt, 8.
Koch v. State, 40.
Kohlheimer v. State, 499.
Kopcyznski v. State, 290.
Kotter v. People, 394.
Kouns v. State, 258.
Krambiel v. Com., 283.
Kribs v. People, 359.
Kring v. Missouri, 31, 33.
Kunkle v. State, 145, 188, 265.

L

Lamb v. People, 115.
Lamb v. State, 430.
Lambert v. People, 441.
Lamkin v. People, 43.
Lamphere, In re, 22.
Lamphier v. State, 316.
Lampton v. State, 285.
Lancaster v. State, 79.
Lancy v. Havender, 433.
Lane v. People, 331, 501.
Lane v. State, 197, 225, 226, 252.
Langan v. State, 149, 261.
Langdon v. People, 74, 75.
Langston v. State, 312.
Lanier v. State, 303.
Lapier's Case, 338.
La Rue v. State, 181.
Lascelles v. State, 386.
Lathrop v. President, etc., of Amherst Bank, 433.
Law v. Com., 63, 252.
Lawrence v. State, 331.
Laws v. State, 302.
Lawson v. State, 254.
Leach v. State, 100.
Leache v. State, 71, 73, 74.
Leak v. State, 445.
Leary v. State, 141.
Ledgerwood v. State, 502.
Lee v. Com., 358.
Lee v. State, 186, 233, 490.
Lefler v. State, 370.
Leigh's Case, 321.
Lemasters v. State, 386.
Le Mott's Case, 297.
Leonard v. State, 119.
Lett v. State, 200.
Levar v. State, 450.
Levet's Case, 91, 179.
Levi v. State, 379.
Levy v. State, 40, 327.
Lewer v. Com., 333.
Lewis, In re, 428.
Lewis v. Broun, 433, 434.
Lewis v. Com., 176, 362.
Lewis v. State, 140, 149, 150, 248, 421.
Lindenmuller v. People, 26.
Lindsey v. State, 486.
Linton v. State, 420.
Livingston v. Com., 171.
Lloyd, In re, 277.
Lockett v. State, 292.
Loeffner v. State, 74.
Loescher v. State, 247.
Lofton v. Vogles, 8.
Loftus v. State, 450.
Logg v. People, 456.
Long v. State, 376, 377.
Loomis v. People, 327.
Looney v. State, 71.
Lord v. State, 402.
Lord Morly's Case, 225.
Louisville, C. & L. R. Co. v. Com., 400.
Louisville & N. R. Co. v. State, 83.
Love v. People, 14.
Love v. State, 314.
Lowenthal v. State, 353.
Loyd v. State, 125.
Loza v. State, 79.
Luddy v. People, 317.
Luke v. State, 289, 292, 293.
Lundy v. State, 339.

[The figures refer to pages]

Lusk v. State, 162.
Luster v. State, 417.
Lutterell v. Reynell, 9.
Lybarger v. State, 33.
Lyle v. State, 79, 445.
Lynch v. Com., 224.
Lynch v. State, 350.
Lynn v. People, 175.
Lyon v. State, 188.
Lyons v. People, 296.
Lyons v. State, 285, 424.

M

McAllister v. State, 170.
McCann v. Com., 498.
McCarty v. State, 33, 124, 127.
McCearley v. State, 44.
McClain v. Com., 208.
McClean v. State, 402.
McClurg v. Com., 181.
McConnell v. State, 265.
McCook v. State, 81.
McCord v. People, 15, 366, 371.
McCord v. State, 445.
McCormack v. State, 62.
McCormick v. State, 377.
McCoy v. State, 115, 126.
McCullough v. State, 267.
McCutcheon v. People, 93.
McDade v. People, 152.
McDaniel v. State, 188, 317, 344, 346.
McDaniel's Case, 13.
McDonald v. Massachusetts, 82.
McDonough, In re, 34.
McDuffie v. State, 183.
McFall v. Com., 479.
McGear v. Woodruff, 40.
McGee v. State, 261.
McGehee v. State, 59, 268.
McGinn v. Tobey, 389.
McGowan v. State, 344.
McGrath v. State, 294, 296.
McGrowther's Case, 100.
McInerney v. City of Denver, 40.
McIntyre v. People, 76, 77, 81.
McKay v. State, 267.
McKee v. State, 155, 210.
Mackin v. People, 446.
McKinny v. State, 251.
McLaren v. State, 330.
McLeland v. State, 417.
McMahan v. State, 216, 217.
McMahon v. State, 114.
McMillan v. State, 207.
McNaghten's Case, 65.
McNeal v. Woods, 290.
McNeeley, Ex parte, 489.
Maconnehey v. State, 77.
McPherson v. Com., 420.
McQuirk v. State, 246, 251.
McTyler v. State, 424, 426.
McWhirt's Case, 220, 221.
Maher v. People, 148, 215, 219, 220, 222, 224, 228, 229, 260.
Malcolmson v. Scott, 355.
Malone v. Com., 283.
Malone v. State, 266.
Manchester v. Massachusetts, 478.
Manley v. People, 480.
Manning v. Sprague, 434.
Marceau, In re, 281.
Marcus v. State, 324.
Marion v. State, 32, 33.
Markley v. Whitman, 269.
Marks v. Baker, 467.
Marley v. State, 147.
Marshall v. State, 94.
Marshall's Case, 81.
Martin v. Miller, 445.
Martin v. State, 63, 116, 186, 274.
Martin's Ex'r v. Martin, 9.
Martindale v. Faulkner, 88.
Martins v. State, 369.
Mary v. State, 288, 289.
Mason v. People, 300.
Mason v. State, 95, 111, 285, 286.
Massie v. State, 272.
Mathews v. State, 245.
Mathis v. Com., 419.
Mathis v. State, 33.
Matthews v. Terry, 272.
Mattingly v. State, 446.
Maupin v. State, 261.
Maxwell v. State, 74.
Maxwell v. Territory, 315.

[The figures refer to pages]

May v. State, 10.
Mayes v. People, 208, 211.
Mayes v. State, 348.
Maynard v. People, 443.
Mayor, etc., of City of New York v. New York & S. I. Ferry Co., 87.
Mays v. State, 224.
Mead v. State, 341.
Medley, In re, 32.
Medrano v. State, 88, 408.
Meeks v. State, 288.
Meister v. People, 118, 122.
Melton v. State, 221, 226, 259, 262.
Menken v. Atlanta, 136.
Merritt v. State, 435.
Metcalf v. State, 270.
Meurer v. State, 196, 199.
Miers v. State, 214.
Mifflin v. Com., 158.
Miles v. U. S., 89.
Miller v. State, 103, 117, 162, 180, 220.
Mills v. Com., 425, 429.
Milton v. State, 260, 262.
Miner v. People, 411.
Miner v. State, 412.
Miners' Bank v. Iowa, 31.
Minnesota v. Barber, 28.
Minter v. State, 295, 298, 339.
Mitchell v. Com., 112, 114, 117, 299, 429.
Mitchell v. State, 178, 279.
Mitchum v. State, 208, 320.
Mitten v. State, 411.
Mockabee v. Com., 214, 223.
Mogler v. State, 134.
Molette v. State, 241.
Molton v. State, 339.
Monday v. State, 260.
Montag v. People, 75.
Montgomery v. Com., 273.
Montgomery v. State, 113.
Moody v. People, 280, 281, 285.
Mooney v. State, 249.
Moore v. Com., 74, 388.
Moore v. Illinois, 500.
Moore v. People, 256, 301.
Moore v. State, 148, 149, 222, 259, 261, 355, 448.
Morehouse v. State, 355.
Morgan v. State, 499.
Morrell v. People, 441.
Morris v. State, 192.
Morris Run Coal Co. v. Barclay Coal Co., 159.
Morrison v. State, 346.
Morse v. State, 60, 129.
Morton v. Shoppoe, 265.
Moye v. State, 349.
Mrous v. State, 33.
Mulford v. People, 355, 359.
Mullaly v. People, 309.
Mullen v. State, 145, 266.
Mulreed v. State, 94.
Mulvey v. State, 103.
Munkers v. State, 423.
Murio v. State, 382.
Murphy v. Com., 32, 233.
Murphy v. State, 207, 210, 275, 277.
Murray v. Com., 197.
Murray's Estate, In re, 433.
Myers v. Malcolm, 399.
Myers v. State, 95, 359.

N

Nash v. State, 204.
Nations v. State, 418.
Navarro v. State, 430.
Neagle, In re, 191.
Neal v. Henry, 399.
Neal v. State, 271.
Nehr v. State, 383.
Nelderluck v. State, 294.
Nelms v. State, 407.
Nelson v. Brush, 433.
Nelson v. State, 389, 391, 445.
New Jersey Steam-Boat Co. v Brockett, 271.
New York & G. L. R. Co. v. State, 83.
Nicholls v. State, 298.
Nichols v. People, 322.
Nichols v. State, 43, 346.
Nicholson v. State, 147.

[The figures refer to pages]

Noecker v. People, 134.
Nolan v. State, 499.
Noles v. State, 184.
Norman v. State, 226.
Norris v. State, 261.
Northern Cent. R. Co. v. Com., 84.
Norton v. Ladd, 309.
Nye v. People, 208, 219.

O

Oakley v. Com., 197, 201.
O'Boyle v. State, 244.
O'Brian v. Com., 499.
Ochs v. People, 156.
Oder v. Com., 183, 197.
O'Donnell v. People, 161.
Ogden v. State, 123.
O'Grady v. State, 80.
Olds v. State, 295, 299.
Oleson v. State, 243.
Oliver v. Com., 425.
Omer v. Com., 115.
O'Neill v. State, 424, 426, 459, 461.
O'Reilly v. People, 442.
Orman v. State, 226.
Orr v. Bank of U. S., 86.
Orr v. People, 157.
Ortwein v. Com., 66.
Osborn v. Gillett, 9.
Owen v. State, 314.
Owens v. State, 96, 344, 414.
Oxx v. State, 371.

P

Pace v. State, 420.
Palatka & I. R. R. Co. v. State, 84.
Palmer v. People, 184, 315, 343.
Pankey v. People, 443.
Parker v. State, 27, 201, 400.
Parsons v. People, 415.
Parsons v. State, 70, 71, 72, 74, 170.
Patillo v. State, 197.
Patten v. People, 177, 191, 197, 205.
Patterson v. Nutter, 271.
Patterson v. People, 197.
Patterson v. State, 148, 260.
Paul v. Detroit, 436.
Pauli v. Com., 394.
Payne v. People, 310, 311.
Payne v. State, 249.
Payner v. Com., 283.
Pearson, In re, 80, 81.
Pearson's Case, 76, 224.
Peck, In re, 282.
Peden v. State, 117.
Pefferling v. State, 261.
Pence v. State, 346.
Pennsylvania v. Campbell, 316, 319.
Pennsylvania v. Honeyman, 210.
Pennsylvania v. McGill, 152.
Pennsylvania v. Misner, 394.
Pennsylvania v. Sullivan, 422.
Penny v. State, 359.
Penton v. State, 417.
People v. Abbott, 46.
People v. Abeel, 390.
People v. Adams, 112.
People v. Ah Fat, 119, 167, 170, 171.
People v. Ah Ping, 114.
People v. Ah Sing, 445.
People v. Albany & V. R. Co., 87.
People v. Anderson, 198, 330, 346, 348.
People v. Angeles, 179.
People v. Aplin, 289, 300.
People v. Arnold, 47, 156.
People v. Austin, 198.
People v. Babcock, 5, 361.
People v. Barber, 70.
People v. Barnes, 344.
People v. Barrett, 500.
People v. Barric, 118, 502.
People v. Batchelder, 273.
People v. Bawden, 74.
People v. Beardsley, 236.
People v. Beckwith, 172.
People v. Beevers, 407, 408.
People v. Beldon, 324.
People v. Belencia, 79.
People v. Bemmerly, 74.
People v. Bennett, 314, 413.

[The figures refer to pages]

People v. Benoit, 419.
People v. Benson, 250.
People v. Bihler, 464.
People v. Blake, 134.
People v. Bliven, 123.
People v. Bolanger, 118.
People v. Boyle, 422.
People v. Bransby, 275.
People v. Brewer, 424.
People v. Brown, 149, 244, 407.
People v. Burkhardt, 384.
People v. Burt, 180, 223.
People v. Burwell, 419.
People v. Bush, 152, 153, 300.
People v. Bushton, 215.
People v. Butler, 157, 225.
People v. Button, 201, 202.
People v. Cage, 499.
People v. Calderwood, 301.
People v. Calhoun, 450.
People v. Call, 324, 326, 346.
People v. Camp, 281, 334.
People v. Campbell, 122, 182, 309.
People v. Carabin, 344.
People v. Carr, 301.
People v. Carrier, 283, 284.
People v. Carter, 168.
People v. Caryl, 271.
People v. Caton, 396.
People v. Chalmers, 46.
People v. Chapman, 114, 251.
People v. Clark, 208, 425, 426, 499.
People v. Clements, 435.
People v. Clough, 11, 276, 369.
People v. Cogdell, 330, 331, 348.
People v. Cole, 177, 199, 316, 371.
People v. Collier, 445.
People v. Collins, 117.
People v. Comstock, 258, 260.
People v. Constantino, 199.
People v. Converse, 355.
People v. Cook, 88, 170, 179, 369, 442.
People v. Corbett, 408.
People v. Corey, 79.
People v. Corporation of Albany, 84, 403.
People v. Cotteral, 292.
People v. Coughlin, 185.
People v. Courier, 246, 259.
People v. Crego, 250.
People v. Crissie, 365.
People v. Crosby, 247.
People v. Crowey, 207.
People v. Cummings, 372.
People v. Cummins, 79.
People v. Cummons, 283.
People v. Cunningham, 402, 404.
People v. Curtis, 13, 483.
People v. Dalrymple, 10, 415.
People v. Dalton, 353.
People v. Dann, 186, 278.
People v. Davidson, 123.
People v. Davis, 386, 415.
People v. Dawell, 409.
People v. Deacons, 172.
People v. De Fore, 426, 427.
People v. De Lay, 360.
People v. De Leon, 280, 281.
People v. Demousset, 283, 284.
People v. Detroit White Lead Works, 399, 400, 404.
People v. Devine, 344.
People v. Dickie, 388.
People v. Dillon, 75.
People v. Dodel, 262, 265.
People v. Dohring, 243, 244.
People v. Dolan, 95.
People v. Drayton, 391.
People v. Dunn, 125.
People v. Dupree, 206.
People v. Durfee, 73.
People v. Dyer, 161.
People v. Ebner, 278, 280.
People v. Eddy, 93.
People v. Elder, 168.
People v. Elliott, 392.
People v. Emerson, 114.
People v. Equitable Gas-Light Co., 83.
People v. Faber, 409.
People v. Fahey, 259.
People v. Fairchild, 289.
People v. Fick, 280, 282.
People v. Finley, 71, 73.
People v. Fish, 215.

[The figures refer to pages]

People v. Fisher, 160, 498.
People v. Fitch, 393, 395.
People v. Fitzpatrick, 280.
People v. Fleming, 149, 261.
People v. Foley, 115, 162.
People v. Foy, 73.
People v. Freel, 219.
People v. Fuller, 233.
People v. Gaige, 443.
People v. Gallagher, 358.
People v. Galland, 359.
People v. Galloway, 392.
People v. Garbutt, 75, 76.
People v. Gardiner, 151.
People v. Gardner, 12, 146, 262, 490.
People v. Garnett, 360.
People v. Gassaway, 126.
People v. Gates, 417.
People v. Gaylord, 307.
People v. Getchell, 367.
People v. Gibbs, 365, 369, 425.
People v. Gibson, 299.
People v. Gill, 488.
People v. Gillis, 340.
People v. Gilman, 155.
People v. Glynn, 374.
People v. Gonzales, 183, 197, 199.
People v. Goodwin, 501.
People v. Gould, 428.
People v. Goulette, 246, 277.
People v. Griffin, 301, 302.
People v. Gukouski, 116.
People v. Haggerty, 288.
People v. Haley, 435.
People v. Hall, 376.
People v. Hamilton, 435.
People v. Handley, 289.
People v. Hanrahan, 39.
People v. Hanselman, 13, 336.
People v. Hardisson, 502.
People v. Harriden, 419.
People v. Harris, 76, 79.
People v. Hartman, 409.
People v. Hayes, 32.
People v. Haynes, 369, 370.
People v. Hennessey, 172.
People v. Henssler, 371.
People v. Higgins, 501.
People v. Hodgkin, 422.
People v. Hoin, 70.
People v. Holmes, 239.
People v. Horrigan, 350.
People v. Horton, 224, 273.
People v. Howard, 147.
People v. Hughes, 43, 377.
People v. Hurst, 359.
People v. Husband, 89.
People v. Hyde, 448.
People v. Jackson, 46, 402.
People v. Jacobs, 365.
People v. Jaffe, 379.
People v. Jenness, 418.
People v. Jerome, 463.
People v. Johnson, 327, 353, 364, 372, 381.
People v. Jones, 143.
People v. Jordan, 365.
People v. Juarez, 346.
People v. Judson, 458.
People v. Justices of Court of Special Sessions, 40.
People v. Kane, 384.
People v. Keeley, 384.
People v. Kehoe, 424, 426.
People v. Kerr, 449.
People v. Kerrigan, 73.
People v. Kibler, 93.
People v. Kirby, 51.
People v. Kirwan, 149, 261.
People v. Knapp, 115, 162, 415.
People v. Krummer, 386.
People v. Krusick, 423.
People v. Lake, 418.
People v. Lanagan, 171.
People v. Lane, 172.
People v. Lee Kong, 143, 267.
People v. Leonardi, 79.
People v. Leong Yune Gun, 267.
People v. Levison, 381.
People v. Lewinger, 393.
People v. Lewis, 76, 171.
People v. Leyba, 259.
People v. Lilley, 219, 220, 254, 260.
People v. Lilly, 186.

[The figures refer to pages]

People v. Liphardt, 13.
People v. Lombard, 183.
People v. Long, 315, 344.
People v. Loughridge, 490.
People v. Lynch, 198, 472.
People v. Lyon, 43.
People v. Lyons, 184, 193.
People v. McAllister, 367, 369, 370.
People v. Macard, 184, 200.
People v. McCord, 14, 304.
People v. McDaniels, 377.
People v. McDonald, 246, 277.
People v. McDonell, 73.
People v. McGarren, 331.
People v. McGonegal, 113, 431.
People v. McGuire, 120.
People v. McKane, 47.
People v. McKay, 271, 501.
People v. McKinney, 34, 356.
People v. McLaughlin, 450.
People v. McLean, 435.
People v. McMakin, 255.
People v. McNulty, 32.
People v. McQuaid, 408.
People v. Malone, 400.
People v. Maloney, 309.
People v. Manchego, 261.
People v. Marks, 95.
People v. Martin, 15.
People v. Mather, 46, 155, 162.
People v. Mendenhall, 408.
People v. Merrill, 280, 483, 484.
People v. Meyer, 337.
People v. Miller, 8, 155, 273, 347.
People v. Mills, 151.
People v. Millspaugh, 285.
People v. Mize, 148.
People v. Montague, 379.
People v. Montarial, 326.
People v. Moody, 383.
People v. Moore, 257.
People v. Moran, 143.
People v. Morehouse, 262, 264, 265.
People v. Morine, 197.
People v. Morino, 346.
People v. Morrison, 243.
People v. Mortimer, 73.
People v. Most, 36.
People v. Muller, 400.
People v. Murback, 225.
People v. Murphy, 13, 339.
People v. Murray, 142, 274.
People v. Myers, 74, 436.
People v. Nelson, 424.
People v. Nolan, 296.
People v. Northey, 449.
People v. North River Sugar Refining Co., 159.
People v. Olmstead, 231, 430.
People v. Olsen, 212, 225, 384.
People v. Orcutt, 289.
People v. Ozboda, 371.
People v. Palmer, 172.
People v. Park, 43.
People v. Parks, 135.
People v. Parshall, 284, 285.
People v. Payne, 178, 273.
People v. Peabody, 145.
People v. Peacock, 386.
People v. Pearl, 274.
People v. Perazzo, 445.
People v. Perini, 324, 353.
People v. Peters, 449.
People v. Petheram, 47.
People v. Phelan, 80.
People v. Phelps, 430.
People v. Pine, 67.
People v. Pline, 501.
People v. Plumsted, 34.
People v. Pool, 214.
People v. Porter, 26.
People v. Quin, 149, 245.
People v. Rae, 333.
People v. Randolph, 147, 252.
People v. Raschke, 333.
People v. Reilly, 34.
People v. Reinitz, 388.
People v. Repke, 100, 112.
People v. Reynolds, 34, 378, 381.
People v. Rice, 370.
People v. Richards, 46, 156, 157.
People v. Richmond, 101.
People v. Robertson, 200, 221.
People v. Roby, 50, 93, 134, 135.

[The figures refer to pages]

People v. Rochester R. & Light Co., 86.
People v. Rockwell, 53, 232.
People v. Rogers, 76, 77, 81.
People v. Royal, 247.
People v. Ruggles, 25, 26.
People v. Rushing, 386.
People v. Ryan, 145.
People v. Samonset, 427.
People v. Sands, 399.
People v. Saunders, 158, 161.
People v. Schenck, 490.
People v. Schultz, 344.
People v. Schuyler, 316.
People v. Scoggins, 183.
People v. Scott, 260.
People v. Seaton, 330.
People v. Shall, 391, 392.
People v. Sharp, 389.
People v. Shears, 343.
People v. Sheldon, 159.
People v. Sherman, 354.
People v. Skutt, 419.
People v. Slack, 233, 408.
People v. Slayton, 344.
People v. Sligh, 113, 349.
People v. Smith, 114, 322, 383.
People v. Spencer, 75.
People v. Spohr, 57.
People v. Sprague, 70, 71.
People v. Squires, 424, 425.
People v. Stanley, 32.
People v. Stetson, 366.
People v. Stewart, 150.
People v. Stockham, 430.
People v. Stokes, 413.
People v. Stubenvoll, 231.
People v. Summers, 370.
People v. Swalm, 317.
People v. Sweeney, 55, 128.
People v. Swetland, 397.
People v. Sylva, 265.
People v. Tarvis, 442, 443.
People v. Taylor, 67, 70, 289.
People v. Thomas, 369.
People v. Thompson, 315, 343.
People v. Thorn, 47.
People v. Todd, 63.
People v. Toland, 297.
People v. Tomlins, 187.
People v. Townsend, 62, 399.
People v. Travers, 76.
People v. Trim, 122.
People v. Tyler, 479, 485, 489.
People v. Van Alstyne, 426.
People v. Vincent, 79.
People v. Wadsworth, 359.
People v. Wakely, 367.
People v. Walker, 79.
People v. Wallace, 425.
People v. War, 43.
People v. Warner, 386.
People v. Wasservogle, 365.
People v. Watson, 371.
People v. Webb, 141, 499.
People v. Weinstock, 423.
People v. Welch, 93, 135.
People v. Wheeler, 278, 392.
People v. Whiteman, 368.
People v. Wicks, 47.
People v. Wiley, 310, 315, 343, 487.
People v. Willey, 445.
People v. Williams, 81, 197, 208, 312, 370.
People v. Wilson, 79, 350.
People v. Winslow, 364.
People v. Wong Ah Teak, 201.
People v. Woods, 116.
People v. Woodward, 114.
People v. Wright, 103, 119, 241.
People v. Youngs, 141.
People v. Ysias, 254, 265.
People v. Zeiger, 93.
People ex rel. Burnham v. Flynn, 158.
People ex rel. Perkins v. Moss, 346.
People ex rel. Scharff v. Frost, 429.
Peoples v. Com., 114, 213, 231.
Perkins v. State, 222, 366.
Perrin v. Com., 330.
Perry v. State, 33, 186, 187.
Peterson v. State, 149.
Pettes v. Com., 123.
Petty, In re, 32.

[The figures refer to pages]

Phelps v. People, 341.
Phillips v. Com., 183.
Phillips v. Innes, 400.
Phillips v. People, 499.
Phillips v. South Park Com'rs, 433.
Phillips v. State, 127, 426.
Philpot v. Com., 258.
Pickens v. State, 224.
Pierce v. State, 258, 274.
Pigg v. State, 13, 335.
Pigman v. State, 80.
Pinder v. State, 194, 197.
Pinkard v. State, 122, 150, 163.
Pinson v. State, 417.
Piper v. State, 460.
Pirtle v. State, 76, 79.
Pistorius v. Com., 197.
Pitcher v. People, 36, 289, 300.
Pitts v. State, 226.
Pittsburgh & Allegheny Bridge Co. v. Com., 84, 404.
Plake v. State, 71, 75.
Pledger v. State, 468.
Plummer v. Smith, 8, 194.
Point v. State, 350.
Polk v. State, 203, 425.
Pollard v. People, 446.
Pollock v. State, 459.
Pomeroy v. State, 249.
Pond v. People, 177, 182, 185, 187, 191, 205, 289.
Pool v. State, 211.
Popinaux v. State, 368.
Porath v. State, 419.
Potter v. State, 57.
Powell v. Com., 394.
Powell v. State, 171, 231.
Powers v. People, 189.
Pratt v. Pratt, 413.
Pratt v. State, 267.
Pressley v. State, 296.
Price v. People, 118, 302.
Price v. State, 222, 401, 498.
Price v. U. S., 13, 262, 264.
Prindle v. State, 36, 422.
Pritchett v. State, 499.
Probert's Case, 291.
Proper v. State, 246, 277.
Pruitt v. State, 281.
Pruner v. Com., 417.
Pugh v. Com., 250.
Pullam v. State, 355.
Putman v. State, 426.

Q

Quarles, In re, 164.
Queen, The, v. Flattery, 12.
Quinn v. People, 301, 314, 330, 353.

R

Rachels v. State, 456.
Radford v. Com., 197, 200.
Rafferty v. People, 76, 223.
Ragland v. State, 181.
Rand v. Com., 32.
Randall v. Com., 43.
Randall v. Evening News Ass'n, 448.
Randolph v. Com., 139.
Ranney v. People, 364.
Ransom v. State, 330, 348.
Rather v. State, 74.
Ratzky v. People, 32.
Rauck v. State, 274.
Raven's Case, 321.
Raymond v. People, 393.
Reagan v. State, 79.
Rebman, In re, 28.
Reddick v. Com., 212.
Reddick v. State, 389.
Reed v. State, 204.
Reese v. State, 219, 222.
Reeves v. State, 355.
Reg. v. Adams, 381.
Reg. v. Addis, 342.
Reg. v. Adey, 354.
Reg. v. Alison, 217.
Reg. v. Allen, 213, 407, 422.
Reg. v. Anderson, 481.
Reg. v. Archer, 188.
Reg. v. Ardley, 366.
Reg. v. Ashwell, 337, 347.
Reg. v. Avery, 317.
Reg. v. Bamber, 107.

[The figures refer to pages]

Reg. v. Banner, 111.
Reg. v. Barronet, 11, 276.
Reg. v. Barrow, 248.
Reg. v. Bazely, 324.
Reg. v. Beecham, 342.
Reg. v. Bennett, 238, 256, 277.
Reg. v. Best, 158.
Reg. v. Birchall, 238.
Reg. v. Bird, 296, 335.
Reg. v. Birkett, 395.
Reg. v. Birmingham & G. R. Co., 83.
Reg. v. Bishop, 93.
Reg. v. Bleasdale, 137.
Reg. v. Bowers, 354.
Reg. v. Boyce, 55.
Reg. v. Bradshaw, 11, 230, 231, 276.
Reg. v. Brooke, 465.
Reg. v. Brooks, 380.
Reg. v. Brown, 119, 143, 160, 407, 422.
Reg. v. Bruce, 194.
Reg. v. Bryan, 366, 368.
Reg. v. Bubb, 234.
Reg. v. Buckmaster, 335.
Reg. v. Bunce, 322.
Reg. v. Button, 256, 257.
Reg. v. Carr, 382, 490.
Reg. v. Case, 12, 277.
Reg. v. Chadwick, 388.
Reg. v. Champlin, 245.
Reg. v. Chamberlain, 233.
Reg. v. Chapman, 142.
Reg. v. Cheafor, 308.
Reg. v. Christopher, 331.
Reg. v. Clarence, 278.
Reg. v. Clarke, 248.
Reg. v. Clarkson, 457.
Reg. v. Clayton, 109.
Reg. v. Clinton, 307.
Reg. v. Closs, 390.
Reg. v. Cohen, 334.
Reg. v. Collins, 143.
Reg. v. Conde, 210, 234.
Reg. v. Coney, 114, 275.
Reg. v. Cruse, 118.
Reg. v. Cullum, 358.
Reg. v. Dadson, 180.
Reg. v. Dalloway, 233.
Reg. v. Daniel, 152.
Reg. v. Dant, 232.
Reg. v. Davis, 77, 170.
Reg. v. Day, 257.
Reg. v. Debruiel, 490.
Reg. v. Dee, 243, 245, 248, 249.
Reg. v. Doherty, 53, 208.
Reg. v. Dolan, 379.
Reg. v. Doody, 80, 217.
Reg. v. Downes, 51, 89, 234.
Reg. v. Dudley, 104, 105, 106.
Reg. v. Dugdale, 139.
Reg. v. Dykes, 102, 103.
Reg. v. Eagleton, 142.
Reg. v. Farrell, 401.
Reg. v. Faulkner, 55, 58, 292.
Reg. v. Featherstone, 316.
Reg. v. Finkelstein, 397.
Reg. v. Fisher, 228.
Reg. v. Flatman, 111.
Reg. v. Flattery, 249.
Reg. v. Fletcher, 245, 248, 276, 355.
Reg. v. Flowers, 337, 347.
Reg. v. Foley, 313.
Reg. v. Franklin, 57.
Reg. v. Friend, 234.
Reg. v. Fulton, 139.
Reg. v. Gamble, 145.
Reg. v. Gardner, 347, 372.
Reg. v. Gathercole, 463, 464.
Reg. v. Geach, 395.
Reg. v. Goodchild, 143.
Reg. v. Goode, 326.
Reg. v. Goodwin, 368.
Reg. v. Goss, 366.
Reg. v. Great North of England R. Co., 83.
Reg. v. Greenwood, 212.
Reg. v. Gregory, 121.
Reg. v. Grey, 400.
Reg. v. Griffin, 193.
Reg. v. Hagan, 214.
Reg. v. Haigh, 323.
Reg. v. Haines, 171, 235.
Reg. v. Hall, 342, 354.

[The figures refer to pages]

Reg. v. Hallett, 243.
Reg. v. Halliday, 169.
Reg. v. Hamilton, 308.
Reg. v. Hancock, 379.
Reg. v. Hands, 321, 339.
Reg. v. Hanson, 256. 257.
Reg. v. Harrison, 316.
Reg. v. Hart, 388.
Reg. v. Haynes, 70, 72.
Reg. v. Hazell, 321.
Reg. v. Hehir, 337.
Reg. v. Hewlett, 181.
Reg. v. Heywood, 396.
Reg. v. Hodgson, 390.
Reg. v. Holland, 169.
Reg. v. Holloway, 306, 341.
Reg. v. Holmes, 401.
Reg. v. Hornby, 334.
Reg. v. Howell, 158.
Reg. v. Hudson, 15, 371.
Reg. v. Hughes, 235, 444.
Reg. v. Instan, 234.
Reg. v. Ion, 396.
Reg. v. Jackson, 117, 271.
Reg. v. James, 264, 265.
Reg. v. Jellyman, 422.
Reg. v. Jennison, 363.
Reg. v. Jones, 289, 310, 346, 362, 369.
Reg. v. Kelly, 111.
Reg. v. Kenny, 316.
Reg. v. Kerr, 332.
Reg. v. Kew, 238.
Reg. v. Keyn, 478.
Reg. v. Kilham, 372.
Reg. v. Kirkham, 219.
Reg. v. Knights, 236.
Reg. v. Knock, 98, 193, 230.
Reg. v. Lancaster, 449.
Reg. v. Langley, 464.
Reg. v. Latimer, 59, 268.
Reg. v. Lawrence, 13, 335.
Reg. v. Leddington, 217.
Reg. v. Lee, 364.
Reg. v. Leslie, 101.
Reg. v. Lewis, 141, 485, 488.
Reg. v. Longbottom, 238.
Reg. v. Lovell, 321.
Reg. v. Lowe, 235.
Reg. v. McGrath, 321.
Reg. v. Macleod, 237.
Reg. v. McPherson, 139, 146.
Reg. v. Madge, 382.
Reg. v. Manley, 111.
Reg. v. March, 256.
Reg. v. Marriott, 236.
Reg. v. Marshall, 354.
Reg. v. Martin, 169, 386.
Reg. v. Masters, 324.
Reg. v. Matthews, 60.
Reg. v. Mears, 158.
Reg. v. Medland, 342.
Reg. v. Meredith, 141.
Reg. v. Michael, 110.
Reg. v. Middleton, 336, 347.
Reg. v. Miller, 380.
Reg. v. Mills, 368.
Reg. v. Mitchell, 389.
Reg. v. Moore, 331.
Reg. v. Morley, 51, 234.
Reg. v. Mucklow, 337.
Reg. v. Murphy, 179.
Reg. v. Nichols, 234.
Reg. v. Norman, 359.
Reg. v. Norval, 325.
Reg. v. O'Brien, 298, 299.
Reg. v. O'Donnell, 342.
Reg. v. Parker, 287, 288.
Reg. v. Parnell, 154.
Reg. v. Pembliton, 55, 58.
Reg. v. Perry, 311.
Reg. v. Petch, 309, 313.
Reg. v. Phetheon, 342.
Reg. v. Phillips, 147, 251.
Reg. v. Pierce, 331.
Reg. v. Plummer, 170.
Reg. v. Pocock, 168, 237.
Reg. v. Pollard, 104.
Reg. v. Powell, 310, 311.
Reg. v. Poyser, 322, 323.
Reg. v. Preston, 329, 348.
Reg. v. Prince, 94, 334.
Reg. v. Privett, 345.
Reg. v. Quail, 152.
Reg. v. Radford, 396.
Reg. v. Ragg, 366.

[The figures refer to pages]

Reg. v. Read, 277, 358.
Reg. v. Reardon, 379.
Reg. v. Reed, 89, 320, 325, 344.
Reg. v. Reeves, 167.
Reg. v. Richardson, 388.
Reg. v. Ridgway, 366.
Reg. v. Riley, 348, 349.
Reg. v. Ring, 143.
Reg. v. Roberts, 125, 139, 141.
Reg. v. Robins, 334.
Reg. v. Robinson, 309, 372.
Reg. v. Rodway, 326.
Reg. v. Rose, 205.
Reg. v. Rothwell, 224, 226.
Reg. v. Rowed, 152.
Reg. v. Russell, 288.
Reg. v. Russett, 335.
Reg. v. St. George, 141, 265.
Reg. v. Salmon, 113, 233.
Reg. v. Saunders, 248.
Reg. v. Schlesinger, 445.
Reg. v. Schmidt, 379.
Reg. v. Sellis, 167.
Reg. v. Selwag, 373.
Reg. v. Senior, 234.
Reg. v. Serne, 209, 210, 212.
Reg. v. Shappard, 334.
Reg. v. Sharman, 390.
Reg. v. Sharpe, 51.
Reg. v. Shepherd, 236.
Reg. v. Shickle, 308.
Reg. v. Simpson, 338.
Reg. v. Sinclair, 256, 277.
Reg. v. Slowly, 327, 328, 334.
Reg. v. Smith, 236, 317, 380, 390, 391.
Reg. v. Solomons, 333.
Reg. v. Stanton, 249.
Reg. v. Stephens, 133, 408.
Reg. v. Stokes, 70.
Reg. v. Stone, 367.
Reg. v. Swindall, 238.
Reg. v. Taylor, 111, 397.
Reg. v. Thompson, 223, 316, 327, 334.
Reg. v. Thristle, 321.
Reg. v. Thurborn, 60, 329, 330.
Reg. v. Tollett, 316.
Reg. v. Tolson, 48, 50, 92, 95, 409, 410.
Reg. v. Tooley, 222, 224.
Reg. v. Toshack, 390.
Reg. v. Towers, 169, 231, 232.
Reg. v. Townley, 308, 309, 312, 313.
Reg. v. Tracy, 110.
Reg. v. Tribilcock, 342.
Reg. v. Trilloe, 167.
Reg. v. Turner, 354.
Reg. v. Twose, 89.
Reg. v. Tyler, 100.
Reg. v. Villensky, 379.
Reg. v. Vincent, 457.
Reg. v. Vreones, 436.
Reg. v. Wade, 379.
Reg. v. Wagstaffe, 51.
Reg. v. Waite, 251.
Reg. v. Walker, 354.
Reg. v. Wallace, 383.
Reg. v. Walne, 364.
Reg. v. Warburton, 157.
Reg. v. Wardraper, 380.
Reg. v. Watson, 401.
Reg. v. Watts, 310, 311, 325.
Reg. v. Webb, 401.
Reg. v. Webster, 314, 316.
Reg. v. Welsh, 219, 220.
Reg. v. West, 167, 331.
Reg. v. Wheeldon, 299.
Reg. v. White, 314, 339, 354, 382, 387.
Reg. v. Wiley, 380.
Reg. v. Williams, 103, 152.
Reg. v. Wilson, 395.
Reg. v. Woodhurst, 247, 277, 278.
Reg. v. Woodward, 60, 129, 380, 381.
Reg. v. Wortley, 312.
Reg. v. Wright, 320.
Reg. v. Wynn, 346, 349.
Reg. v. York, 330.
Reg. v. Young, 220, 455.
Reimer's Appeal, 403.
Rembert v. State, 392.
Reneau v. State, 44, 176, 177.
Renew v. State, 443.

[The figures refer to pages]

Respublica v. Caldwell, 404.
Respublica v. Carlisle, 472.
Respublica v. De Longchamps, 496.
Respublica v. McCarty, 100.
Respublica v. Malin, 147.
Respublica v. Mesca, 22.
Respublica v. Powell, 362.
Respublica v. Teischer, 346, 383.
Revoir v. State, 75.
Rex v. Adams, 333, 372.
Rex v. Adey, 222.
Rex v. Allen, 177.
Rex v. Almon, 131, 132, 465.
Rex v. Anderson, 489.
Rex v. Astley, 375.
Rex v. Bailey, 88, 299.
Rex v. Banks, 321, 347.
Rex v. Barnard, 367.
Rex v. Bass, 324.
Rex v. Bazeley, 320, 352.
Rex v. Beacall, 14, 355.
Rex v. Bembridge, 452.
Rex v. Bennett, 297.
Rex v. Bigley, 13, 304.
Rex v. Billingham, 11, 275.
Rex v. Bingley, 111.
Rex v. Birkett, 389.
Rex v. Blake, 462.
Rex v. Blockham, 375.
Rex v. Bootie, 439.
Rex v. Bower, 451.
Rex v. Brain, 167.
Rex v. Bramley, 314, 315.
Rex v. Brazier, 322.
Rex v. Brice, 295.
Rex v. Brodribb, 457.
Rex v. Bull, 319.
Rex v. Burdett, 465.
Rex v. Burgess, 316.
Rex v. Burnett, 400.
Rex v. Cabbage, 345.
Rex v. Campbell, 334.
Rex v. Chissers, 327.
Rex v. Clark, 317.
Rex v. Clay, 339.
Rex v. Clewes, 172.
Rex v. Coombes, 486.
Rex v. Cooper, 120.
Rex v. Cross, 400, 405.
Rex v. Crump, 342.
Rex v. Crutchley, 100.
Rex v. Dale, 368.
Rex v. Davies, 301.
Rex v. Davis, 297, 298.
Rex v. Delavel, 158.
Rex v. Dickinson, 341.
Rex v. Dingley, 319.
Rex v. Dixon, 133, 399.
Rex v. Dunn, 386.
Rex v. Dunnage, 8.
Rex v. Edward, 376.
Rex v. Egginton, 14, 304.
Rex v. Enoch, 167.
Rex v. Esop, 88.
Rex v. Finnerty, 177.
Rex v. Flannagan, 301.
Rex v. Fletcher, 322.
Rex v. Ford, 214.
Rex v. Francis, 373.
Rex v. Fuller, 139.
Rex v. Gammon, 250.
Rex v. Gibbons, 300.
Rex v. Gilbert, 334.
Rex v. Gill, 155.
Rex v. Goodhall, 364.
Rex v. Gray, 301.
Rex v. Great Western Laundry Co., 86.
Rex v. Greenacre, 215.
Rex v. Groombridge, 35.
Rex v. Grout, 233.
Rex v. Gutch, 132.
Rex v. Haines, 296.
Rex v. Hall, 89, 344, 376.
Rex v. Hantin, 358.
Rex v. Harrington, 191.
Rex v. Hartley, 354.
Rex v. Harvey, 333, 335, 467.
Rex v. Haswell, 439.
Rex v. Headge, 13, 335, 353.
Rex v. Heath, 139.
Rex v. Hickman, 152.
Rex v. Higgins, 152.
Rex v. Hogan, 339.
Rex v. Hood, 454.
Rex v. Howard, 229.

[The figures refer to pages]

Rex v. Hughes, 299.
Rex v. Hull, 232.
Rex v. Hyams, 296.
Rex v. Jackson, 248, 333, 334, 366.
Rex v. Jacobs, 422.
Rex v. James, 262.
Rex v. Jarvis, 126.
Rex v. Johnson, 295.
Rex v. Jones, 452.
Rex v. Joyner, 383.
Rex v. Kelly, 119.
Rex v. King, 117.
Rex v. Kirkwood, 111, 120.
Rex v. Knight, 54, 233.
Rex v. Lapier, 375.
Rex v. Lawrence, 296.
Rex v. Lewis, 294.
Rex v. Lockett, 386.
Rex v. Longstreeth, 334.
Rex v. Lord Grey, 157.
Rex v. Lynch, 229.
Rex v. Lyons, 301.
Rex v. Macdaniel, 169.
Rex v. Madox, 322.
Rex v. Mann, 217.
Rex v. March, 290.
Rex v. Martin, 289, 300.
Rex v. Medley, 133.
Rex v. Mellish, 354.
Rex v. Monteth, 45.
Rex v. Morfit, 345.
Rex v. Mulreaty, 422.
Rex v. Murray, 324.
Rex v. Oneby, 228.
Rex v. Owen, 62.
Rex v. Palmer, 226.
Rex v. Paradice, 326.
Rex v. Parker, 366.
Rex v. Parkes, 332.
Rex v. Pear, 322.
Rex v. Pedley, 445.
Rex v. Penny, 464.
Rex v. Perkes, 298.
Rex v. Phillips, 341, 342.
Rex v. Pitman, 340.
Rex v. Pitwood, 235.
Rex v. Porter, 158.
Rex v. Pratley, 322.
Rex v. Pratt, 334.
Rex v. Prowes, 489.
Rex v. Pywell, 157.
Rex v. Rampton, 233.
Rex v. Reekspear, 422.
Rex v. Regan, 293.
Rex v. Rew, 169.
Rex v. Richardson, 381.
Rex v. Roderick, 139.
Rex v. Rosinski, 12, 277.
Rex v. Russell, 296.
Rex v. Rust, 299.
Rex v. St. George, 264.
Rex v. Scully, 178, 180.
Rex v. Searing, 309.
Rex v. Sharpless, 334.
Rex v. Sheperd, 53.
Rex v. Smith, 295, 299, 354.
Rex v. Snowley, 358.
Rex v. Soares, 112.
Rex v. Spriggs, 294, 295.
Rex v. Squire, 354.
Rex v. Stallion, 288.
Rex v. Stewart, 139.
Rex v. Stokes, 439.
Rex v. Stratton, 105.
Rex v. Sullens, 319, 353.
Rex v. Summers, 454.
Rex v. Sutton, 139.
Rex v. Taylor, 350.
Rex v. Thomas, 80.
Rex v. Thompson, 338.
Rex v. Thorley, 358.
Rex v. Tideswell, 321.
Rex v. Tolface, 316.
Rex v. Topham, 463.
Rex v. Treble, 394.
Rex v. Turner, 6, 157.
Rex v. Tyson, 217.
Rex v. Vantandillo, 400.
Rex v. Vaughan, 152.
Rex v. Vyse, 311.
Rex v. Wakeling, 367.
Rex v. Wall, 391.
Rex v. Walsh, 338.
Rex v. Walter, 132.
Rex v. Ward, 404.
Rex v. Westbeer, 45, 311, 312.

[The figures refer to pages]

Rex v. Wheatley, 361.
Rex v. Wheatly, 5, 8.
Rex v. White, 115, 400, 436.
Rex v. Williams, 452.
Rex v. Willis, 316.
Rex v. Wody, 311.
Rex v. Wright, 342.
Reynolds v. People, 122, 125, 126.
Reynolds v. State, 245.
Reynolds v. U. S., 51, 89, 410.
Rice v. State, 233.
Richards, Ex parte, 448.
Richardson v. State, 417.
Richmond v. Fisk, 257.
Riflemaker v. State, 241.
Riggs v. State, 101, 102, 220.
Rigmaidon's Case, 237.
Riley v. State, 95, 488.
Ritchey v. People, 181.
Road Commission v. Haring, 34.
Roberts v. People, 79, 82.
Roberts v. State, 214, 220, 291, 332, 346, 386.
Robertson v. State, 233, 261.
Robinson v. State, 145, 323, 343.
Robson v. State, 10, 360.
Rodgers v. State, 246, 250.
Rogers v. Com., 143.
Rogers v. State, 79, 171.
Rolland v. Com., 294, 295, 297.
Rollins v. State, 389.
Roode v. State, 392.
Rose v. Com., 295.
Rose v. State, 204.
Ross v. Com., 341.
Ross v. People, 333.
Rowe v. U. S., 187, 201.
Royal Circle v. Achterrath, 216.
Rudicel v. State, 392.
Ruloff v. People, 117, 172, 178.
Rump v. Com., 445.
Rung v. Shoneberger, 404.
Runyan v. State, 181, 200.
Russell v. State, 409.

S

Saens v. State, 204, 205.
Sage v. State, 121.
St. Louis, A. & T. R. Co. v. State, 83.
Sanders v. People, 443.
Sanders v. State, 11, 101.
Sanderson v. Com., 381.
Sanford v. State, 187.
Sans v. People, 22.
Sasser v. State, 386.
Saunders' Case, 97, 121, 194, 212.
Savannah, F. & W. R. Co. v. State, 84.
Sawyer v. State, 224.
Saylor v. Com., 191.
Sayre v. Louisville Union Benev. Ass'n, 159.
Sayres v. Com., 71.
Scales v. State, 183.
Scarlett v. State, 363.
Schlect v. State, 221, 222.
Schmidt v. State, 136.
Schmidt v. U. S., 52.
Schnier v. People, 197.
Schoenfeldt v. State, 419.
Schultz v. State, 341.
Schwabacher v. People, 300.
Scott v. Com., 71.
Scott v. Fleming, 274.
Scott v. People, 430.
Scott v. State, 55, 148.
Scruggs v. State, 285, 286.
Seacord v. People, 403, 404.
Searles v. State, 119.
Sedgwick v. Stanton, 434.
Self's Case, 234.
Sellers v. State, 225.
Semayne's Case, 191.
Severance v. Carr, 344.
Seville v. State, 161.
Shadle v. State, 258.
Shafher v. State, 408.
Shannon v. People, 36, 123.
Sharp v. State, 170, 191, 367.
Shaw v. State, 204.
Sheffill v. Van Deusen, 465.
Shelburn v. Com., 355.
Shelly v. State, 418.
Shepard, In re, 452.
Shepherd v. People, 32, 200.

[The figures refer to pages]

Sherley v. Riggs, 434.
Sherman v. State, 376.
Sherwood, Ex parte, 223.
Shields v. Yonge, 8.
Shinn v. State, 374, 376.
Shipply v. People, 334.
Shirk v. People, 393.
Shores, Ex parte, 438.
Shorter v. People, 197, 198, 199.
Shufflin v. People, 225.
Sikes v. Com., 376.
Silver v. State, 443.
Simmerman v. State, 223.
Simmons v. State, 127, 226, 351.
Simmons v. U. S., 500, 501.
Simon's Case, 339.
Simpson v. State, 148, 459, 460, 487.
Skidmore v. State, 258.
Skinner v. State, 149, 261.
Slatterly v. People, 148.
Slattery v. People, 430.
Slattery v. State, 241.
Slaughter v. Com., 219, 220.
Sloane, Ex parte, 225.
Slomer v. People, 160, 278, 279.
Smith v. Com., 71, 139, 153, 312, 412.
Smith v. Milburn, 424.
Smith v. Odell, 31.
Smith v. People, 157, 322.
Smith v. Price, 433.
Smith v. State, 36, 37, 43, 73, 92, 120, 123, 170, 171, 176, 183, 184, 197, 203, 213, 220, 254, 259, 266, 267, 277, 278, 279, 280, 292, 293, 340, 370, 379, 389, 397, 417, 419, 429, 430, 444, 455.
Smurr v. State, 191.
Snap v. People, 384.
Snell v. State, 390.
Snelling v. State, 214.
Snowden v. State, 270.
Snyder v. People, 290, 291.
Sossamon v. Cruse, 176.
South v. State, 33, 284.
Spann v. State, 66.
Sparks v. Com., 233.
Speiden v. State, 14, 304.
Speir v. Brooklyn, 402.
Spencer v. State, 162, 374.
Spies v. People, 108, 154, 162.
Spigner v. State, 275.
Spivey v. State, 260.
Springfield v. State, 79, 81, 199.
Springville v. Thomas, 31.
Squire v. State, 95, 199, 409.
Stabler v. Com., 141, 152, 153.
Stafford v. State, 456.
Stallings v. State, 359.
Stanley v. Com., 191, 197.
Stanley v. State, 350, 490.
Starck v. State, 348.
Starin v. People, 123.
Starkie v. Com., 322.
State v. Aaron, 63.
State v. Abley, 304, 336.
State v. Abram, 241.
State v. Abrisch, 426.
State v. Adams, 13, 62, 426.
State v. Adamson, 393.
State v. Ah Jim, 34.
State v. Aiken, 431.
State v. Alexander, 70, 74, 339, 443.
State v. Alford, 270.
State v. Alfred, 258.
State v. Allen, 117, 122, 139, 163, 314, 500.
State v. Ames, 449.
State v. Anderson, 119, 175, 208, 224, 328, 335.
State v. Angel, 284.
State v. Anone, 118.
State v. Appling, 401.
State v. Archer, 262, 266, 356.
State v. Armington, 409.
State v. Armstrong, 411, 412.
State v. Arnold, 63.
State v. Asher, 51, 371.
State v. Ashley, 208.
State v. Atchison, 84, 86.
State v. Atherton, 151, 245, 276
State v. Austin, 273.
State v. Avery, 152, 224, 412, 463, 465.

[The figures refer to pages]

State v. Ayers, 487.
State v. Babcock, 34, 479.
State v. Bacon, 130.
State v. Baden, 114.
State v. Baer, 93.
State v. Bagan, 151, 276.
State v. Baker, 170, 254, 257.
State v. Baltimore & O. R. Co., 83, 84.
State v. Baltimore & S. Steam Co., 93.
State v. Bancroft, 302.
State v. Banks, 316.
State v. Bantley, 170.
State v. Barefoot, 408.
State v. Barrett, 56, 117, 212, 435.
State v. Barry, 266.
State v. Bartlett, 75, 490.
State v. Barton, 62.
State v. Bauman, 389.
State v. Baumhager, 356.
State v. Beal, 143, 303.
State v. Beasley, 396.
State v. Beaucleigh, 118.
State v. Beck, 275, 276.
State v. Bee, 297.
State v. Beebe, 123, 439.
State v. Beekman, 383.
State v. Bell, 80, 136.
State v. Benham, 182, 193.
State v. Bennett, 490.
State v. Berkley, 225.
State v. Berryman, 312.
State v. Bertheol, 401.
State v. Bethune, 225.
State v. Bierce, 427.
State v. Black, 274, 372.
State v. Bland, 176.
State v. Bobbst, 284.
State v. Bodie, 198.
State v. Bogue, 124.
State v. Bolin, 358.
State v. Bonds, 153.
State v. Bonell, 38.
State v. Bonofiglio, 180.
State v. Boogher, 463.
State v. Boon, 261, 294, 295, 296.
State v. Bostick, 63.
State v. Bowen, 498.
State v. Bowers, 152, 153.
State v. Boyd, 330.
State v. Brady, 260, 464.
State v. Brandenburg, 427, 428.
State v. Brazil, 458.
State v. Brecht, 415.
State v. Briggs, 274.
State v. Brittain, 191, 200, 206.
State v. Brooks, 149, 248, 355, 356.
State v. Brow, 283.
State v. Brown, 215, 241, 242, 309, 346, 377, 419, 436, 445, 446, 490.
State v. Bruder, 94.
State v. Brunson, 412.
State v. Buchanan, 22, 154, 156, 157.
State v. Buckman, 400.
State v. Bugbee, 137.
State v. Bullock, 191.
State v. Burgdorf, 243.
State v. Burke, 130, 182, 274, 365.
State v. Burket, 499.
State v. Burnett, 370.
State v. Burnham, 11, 157, 275, 464, 466.
State v. Burrows, 372.
State v. Burt, 312.
State v. Burton, 450.
State v. Bussey, 284.
State v. Butler, 147, 153, 369, 448.
State v. Butman, 55, 260, 357.
State v. Byers, 215.
State v. Caddle, 346.
State v. Cain, 93.
State v. Caldwell, 489.
State v. Calhoun, 374.
State v. Calkins, 397.
State v. Campbell, 310.
State v. Cantleny, 182.
State v. Carroll, 411.
State v. Carron, 285, 425.
State v. Carter, 369, 485, 489.
State v. Carver, 441.
State v. Castello, 171.
State v. Center, 232.
State v. Central R. Co. of New Jersey, 84.

[The figures refer to pages]

State v. Chamberlin, 442.
State v. Chambers, 338, 419.
State v. Chandler, 442.
State v. Chapin, 487.
State v. Chapman, 261.
State v. Charles, 499.
State v. Chastain, 113, 136.
State v. Chicago, M. & St. P. R. Co., 83.
State v. Chisenhall, 284.
State v. Chitty, 434.
State v. Christian, 210.
State v. Church, 255.
State v. Clark, 75, 155, 162, 301, 350.
State v. Cleaves, 103.
State v. Clifford, 40.
State v. Close, 399.
State v. Coats, 172.
State v. Cody, 241.
State v. Coleman, 51, 239.
State v. Collingsworth, 57.
State v. Collins, 197.
State v. Comings, 359.
State v. Conally, 274.
State v. Conlin, 40.
State v. Connelly, 355.
State v. Conners, 296.
State v. Connor, 260.
State v. Constatine, 130.
State v. Conway, 330, 348.
State v. Cooler, 33.
State v. Coombs, 348, 349.
State v. Cooper, 302, 412, 415, 429.
State v. Costin, 355.
State v. Countryman, 186.
State v. Covert, 359.
State v. Covington, 304, 392.
State v. Cox, 114, 412, 416.
State v. Coyle, 389.
State v. Craige, 338.
State v. Crawford, 198, 241, 299.
State v. Cross, 80, 151, 276, 395.
State v. Crow, 264.
State v. Crowner, 417.
State v. Crummey, 402.
State v. Culler, 203.
State v. Cunningham, 245, 247.
State v. Currie, 336.
State v. Cushing, 182, 187.
State v. Cutshall, 484.
State v. Czizek, 357.
State v. Dalton, 250.
State v. Daly, 261.
State v. Dana, 419.
State v. Darling, 116.
State v. Davidson, 203.
State v. Davis, 74, 152, 184, 254, 266, 339, 343, 346, 370, 390, 393, 394, 438, 449.
State v. Dayton, 442, 443.
State v. Decklotts, 196, 208.
State v. De Hart, 370.
State v. De La Foret, 496.
State v. Dennison, 208.
State v. Denoon, 134.
State v. Denton, 357.
State v. Depoister, 250.
State v. De Rance, 74.
State v. Dewer, 43, 122, 126.
State v. De Witt, 161.
State v. Dickerson, 272.
State v. Dierberger, 175.
State v. Dill, 259.
State v. Dillon, 201.
State v. Dixon, 364.
State v. Doepke, 308.
State v. Donahoe, 197.
State v. Donaldson, 157, 160.
State v. Donnelly, 182, 200.
State v. Donovan, 80, 426.
State v. Donyes, 188.
State v. Dooley, 274.
State v. Dorman, 94.
State v. Dorrance, 393.
State v. Dorsey, 233.
State v. Douglass, 79, 113, 114.
State v. Dowe, 364, 365.
State v. Dowell, 251.
State v. Doyle, 259.
State v. Dubuque & S. C. R. Co., 84.
State v. Ducker, 337, 348.
State v. Dudoussat, 13.
State v. Dula, 435.
State v. Dunn, 392.

[The figures refer to pages]

State v. Durham, 223.
State v. Dyer, 160.
State v. Eaton, 197.
State v. Eckler, 425.
State v. Edge, 262, 279.
State v. Eding, 419.
State v. Edwards, 44.
State v. Elick, 150.
State v. Ellick, 222.
State v. Elliot, 274.
State v. Elliott, 225.
State v. Ellis, 418, 419, 447, 449.
State v. Elvins, 259.
State v. Emery, 233.
State v. Empey, 125, 127.
State v. England, 321.
State v. Estabrooks, 443.
State v. Estes, 370.
State v. Evans, 148, 184, 197, 241, 260.
State v. Fairclough, 322.
State v. Fann, 321.
State v. Fanning, 459.
State v. Farr, 94, 114.
State v. Farrar, 12, 277, 280, 281, 282, 285.
State v. Farrell, 386.
State v. Farrier, 455.
State v. Farrington, 356.
State v. Farrow, 330.
State v. Felter, 71.
State v. Fenn, 317, 327.
State v. Ferguson, 214, 330.
State v. Finan, 137.
State v. Findley, 357.
State v. Fisher, 100, 344.
State v. Fitzgerald, 144, 430.
State v. Fitzporter, 232.
State v. Flanders, 388.
State v. Fleming, 296.
State v. Fletcher, 36.
State v. Fley, 119.
State v. Floyd, 390.
State v. Fooks, 364, 369, 371.
State v. Foote, 385.
State v. Forsythe, 430.
State v. Foster, 298.
State v. Fourcade, 40.
State v. Fowler, 62.
State v. Fox, 302.
State v. Friend, 356.
State v. Frisch, 10.
State v. Fulkerson, 110.
State v. Furlong, 314, 443.
State v. Furney, 162.
State v. Gainer, 399.
State v. Gallegher, 55.
State v. Garrett, 175, 439.
State v. Garris, 371.
State v. Garvey, 79, 80.
State v. Gaston, 109.
State v. Gates, 442, 445.
State v. Germain, 333.
State v. German, 172.
State v. Gessert, 488.
State v. Gherkin, 391, 394.
State v. Gibson, 284, 420.
State v. Gilligan, 384.
State v. Gilman, 188, 273.
State v. Gilmer, 341.
State v. Gilmore, 203, 212.
State v. Girkin, 241.
State v. Glasgow, 450.
State v. Glenn, 40.
State v. Glidden, 155, 160.
State v. Glover, 145, 256, 266.
State v. Godfrey, 258, 262, 264, 265.
State v. Goff, 106.
State v. Goin, 62.
State v. Goldman, 382.
State v. Gooch, 220.
State v. Goode, 358.
State v. Goodenow, 88, 96, 409, 413.
State v. Goodrich, 408.
State v. Goold, 271.
State v. Gorham, 314.
State v. Gorman, 322.
State v. Grady, 487.
State v. Graham, 401.
State v. Grant, 47.
State v. Gravelin, 136.
State v. Gray, 422.
State v. Grayor, 220.
State v. Grear, 74, 80.

[The figures refer to pages]

State v. Green, 220, 241, 338.
State v. Gregory, 270.
State v. Grisham, 355.
State v. Groning, 296.
State v. Grossheim, 277.
State v. Grubb, 250.
State v. Grugin, 226.
State v. Gryder, 388.
State v. Guild, 63, 172.
State v. Guiton, 418.
State v. Gustin, 40.
State v. Gut, 66, 68, 79, 222.
State v. Haab, 78, 82.
State v. Haines, 251, 401.
State v. Hair, 241.
State v. Hairston, 251.
State v. Hall, 288, 312, 334, 486, 500.
State v. Hambright, 168.
State v. Hamilton, 113.
State v. Hampton, 264, 265.
State v. Handy, 148.
State v. Hannett, 290.
State v. Hardie, 91, 233.
State v. Hardy, 203.
State v. Hargrave, 250.
State v. Harman, 224.
State v. Harney, 151, 153.
State v. Harr, 43.
State v. Harrell, 459.
State v. Harrigan, 82.
State v. Harris, 178, 270.
State v. Harrison, 69, 70.
State v. Hartfiel, 93.
State v. Hartigan, 151, 276.
State v. Hartley, 435.
State v. Hascall, 444.
State v. Hastings, 498.
State v. Hattaway, 445, 446.
State v. Hause, 93.
State v. Hawkins, 200, 346.
State v. Hayes, 117, 346, 425.
State v. Haynes, 291.
State v. Heck, 93.
State v. Hecox, 338.
State v. Hemm, 425, 427.
State v. Henry, 298.
State v. Hensley, 220.
State v. Herbert, 296.
State v. Herdina, 205.
State v. Herges, 418.
State v. Herrell, 180.
State v. Herselus, 137.
State v. Heuchert, 38.
State v. Hickling, 158.
State v. Higgins, 338, 394.
State v. Hildreth, 114, 220, 222.
State v. Hill, 199, 201, 202, 219, 221, 222, 227, 490.
State v. Hilton, 392.
State v. Hinson, 464.
State v. Hinton, 411.
State v. Hobgood, 377.
State v. Hockett, 68, 71, 208, 210, 222, 225.
State v. Hodgkins, 499.
State v. Hodgskins, 412.
State v. Hoelcher, 103.
State v. Holt, 235.
State v. Holder, 309.
State v. Hollyway, 377.
State v. Holme, 224.
State v. Holmes, 344.
State v. Hood, 371.
State v. Horne, 256.
State v. Horton, 57, 427.
State v. Hoskins, 463.
State v. House, 308.
State v. Houston, 103.
State v. Houx, 94, 95, 246.
State v. Howard, 183.
State v. Hoxsie, 136.
State v. Hoyt, 33, 220, 221, 225, 226.
State v. Huegin, 158.
State v. Huff, 53.
State v. Hughes, 409, 426, 501.
State v. Hull, 13, 270.
State v. Hunter, 203, 279, 403.
State v. Hurd, 290.
State v. Hurley, 141.
State v. Hutchinson, 300.
State v. Huting, 68.
State v. Ingersoll, 4.
State v. Ives, 379.
State v. Jack, 75.

[The figures refer to pages]

State v. Jackson, 33, 183, 199, 449.
State v. Jacobs, 220.
State v. James, 314.
State v. Jamison, 284.
State v. Jansen, 117.
State v. Jarvis, 324, 419.
State v. Jefferson, 389.
State v. Jenkins, 443.
State v. Jennings, 358.
State v. John, 76, 224, 374, 375.
State v. Johnson, 33, 46, 71, 73, 79, 82, 95, 116, 117, 220, 241, 283, 284, 298, 308, 392, 490.
State v. Jones, 67, 68, 71, 109, 115, 199, 222, 241, 251, 252, 339, 362.
State v. Jordan, 139.
State v. Jump, 196, 200.
State v. Kaster, 400, 404.
State v. Kattlemann, 394.
State v. Keeland, 47.
State v. Keenan, 443, 447.
State v. Keith, 285, 286.
State v. Kelly, 93, 103, 126, 485, 489.
State v. Kendall, 149, 261.
State v. Kennedy, 181, 188, 374.
State v. Kent, 315, 357.
State v. Kern, 451.
State v. Keyes, 153, 161.
State v. Kimmerling, 281.
State v. King, 357, 403.
State v. Kingsly, 33.
State v. Kinkead, 94.
State v. Kinney, 271.
State v. Kittelle, 134.
State v. Kluseman, 63.
State v. Knight, 70, 484, 485.
State v. Knouse, 501.
State v. Knowlton, 371.
State v. Kortgaard, 359.
State v. Kotovsky, 219, 222.
State v. Kroeger, 388, 393.
State v. Kube, 364.
State v. Kusnick, 357.
State v. Kyne, 46.
State v. Lacey, 246.
State v. La Forrest, 422.
State v. Lallyer, 172.
State v. Landgraf, 170.
State v. Lane, 200.
State v. Lapoint, 295.
State v. Larkin, 122.
State v. Lash, 411, 412.
State v. Latham, 383.
State v. Laughlin, 291.
State v. Lavalley, 443.
State v. Lawrence, 70, 73, 74, 147.
State v. Lawson, 462.
State v. Leach, 438, 439.
State v. Learnard, 111.
State v. Le Blanch, 490.
State v. Ledford, 317, 341.
State v. Lee, 40, 431.
State v. Leedy, 350.
State v. Levelle, 56, 210, 212, 216, 225.
State v. Levy, 330.
State v. Lewis, 67, 75, 427, 438.
State v. Linde, 384.
State v. Lindenthall, 322.
State v. Linkhaw, 454.
State v. Littschke, 357.
State v. Locker, 401.
State v. Lockerby, 425.
State v. Lorry, 400.
State v. Lovell, 34.
State v. Lowe, 76.
State v. Lucas, 120.
State v. Lung, 149, 245, 261.
State v. Lunsford, 279.
State v. Lymburn, 109.
State v. Lymus, 309.
State v. Lyon, 290.
State v. McCall, 299.
State v. McCance, 131.
State v. McCann, 331.
State v. McCants, 220, 222, 228.
State v. McCartey, 334.
State v. McCarthy, 443.
State v. McCaskey, 425.
State v. McClellan, 310.
State v. McConkey, 370.
State v. McCoy, 74.
State v. McCrum, 285.
State v. McCullough, 71.

[The figures refer to pages]

State v. McCune, 375.
State v. McDaniel, 150, 203, 221, 303.
State v. McDonald, 32, 183, 188, 448.
State v. McDonnell, 219, 222.
State v. McDuffie, 273.
State v. McGowan, 288, 289.
State v. McGuire, 260.
State v. McIntire, 424.
State v. McKean, 118.
State v. McKee, 499, 500, 501.
State v. Mackey, 428.
State v. McKinney, 444.
State v. McKinstry, 161.
State v. McKnight, 302.
State v. McMackin, 392, 395.
State v. McNab, 212.
State v. McNally, 161.
State v. McPherson, 297.
State v. McRae, 314.
State v. McRoberts, 281.
State v. Madison, 403.
State v. Ma Foo, 103, 241.
State v. Mahoney, 130, 131.
State v. Maier, 68.
State v. Main, 483.
State v. Mallett, 43.
State v. Maloney, 283.
State v. Mansel, 4.
State v. Manuel, 383.
State v. Manufacturing Co., 88.
State v. Marfaudille, 190.
State v. Martin, 140, 187, 255, 265, 266, 274.
State v. Martindale, 35.
State v. Mason, 467.
State v. Massage, 222.
State v. Massey, 149, 261.
State v. Matthews, 137, 197, 357.
State v. Matthis, 136.
State v. Maxwell, 388.
State v. May, 115, 311.
State v. Mayberry, 46, 154, 157.
State v. Meerchouse, 288, 300.
State v. Melton, 43, 205.
State v. Metsch, 369.
State v. Mewherter, 71.
State v. Middleham, 186, 187.
State v. Middleton, 362.
State v. Miles, 449.
State v. Milholland, 62.
State v. Millard, 401.
State v. Miller, 7, 70, 246, 374.
State v. Mills, 346, 370.
State v. Milsaps, 254.
State v. Mims, 356.
State v. Mitchell, 58, 143, 267, 292.
State v. Monongahela River R. Co., 83.
State v. Montgomery, 149, 370.
State v. Mooney, 254.
State v. Moore, 33, 54, 60, 176, 178, 189, 190, 212, 213, 220, 296, 301, 302, 303, 312, 399, 425, 487.
State v. Moothart, 431.
State v. Mordecai, 298.
State v. Morea, 171.
State v. Moretti, 101.
State v. Morey, 198.
State v. Morgan, 188, 254, 256, 273.
State v. Morphy, 170.
State v. Morris, 302.
State v. Morrison, 233, 436.
State v. Morton, 137.
State v. Mowry, 70, 76, 214.
State v. Mueller, 46, 93, 132.
State v. Mullen, 81, 314.
State v. Murdoch, 109.
State v. Murdy, 200.
State v. Murphy, 42, 46, 158, 187, 248, 308.
State v. Murray, 46, 73, 74, 439.
State v. Myers, 359.
State v. Napper, 145.
State v. Nargashian, 100, 101.
State v. Narrows Island Club, 406.
State v. Nash, 249, 261.
State v. Neeley, 200.
State v. Neely, 255, 261, 265.
State v. Neidt, 400.
State v. Neimeier, 367.
State v. Nelson, 258, 315.
State v. Neville, 224.

[The figures refer to pages]

State v. New, 359.
State v. Newcomer, 245.
State v. Nickleson, 62.
State v. Nixon, 75.
State v. Noeninger, 113.
State v. Noland, 356.
State v. Norton, 159, 399.
State v. Norvell, 498.
State v. Noyes, 46, 156, 161.
State v. Nueslein, 57.
State v. Nugent, 419.
State v. O'Brien, 16, 171, 233, 235, 237, 296.
State v. O'Connor, 377.
State v. Odell, 499.
State v. Oliver, 271.
State v. Orrell, 171.
State v. Orrick, 123.
State v. Osborn, 465.
State v. Osborne, 417.
State v. Ostrander, 258.
State v. Otis, 428.
State v. Outlaw, 300.
State v. Overstreet, 284.
State v. Owsley, 149, 261.
State v. Pagels, 70.
State v. Painter, 254.
State v. Palmer, 369.
State v. Parker, 198, 203, 207, 316, 499.
State v. Parrish, 442.
State v. Parsons, 374.
State v. Partlow, 188, 203.
State v. Passaic County Agr. Soc., 86.
State v. Patterson, 123, 124, 186, 225.
State v. Paul, 365.
State v. Peacock, 65, 185.
State v. Pearce, 411.
State v. Pennington, 401.
State v. Pepper, 26.
State v. Perkins, 455.
State v. Perry, 459.
State v. Peters, 444.
State v. Phillips, 258.
State v. Phipps, 164, 384.
State v. Pickett, 277.
State v. Pike, 82, 208.
State v. Porter, 215, 369.
State v. Portland, 83, 84, 403.
State v. Postal, 260.
State v. Potter, 103.
State v. Potts, 73, 77, 82, 300.
State v. Powe, 282.
State v. Powell, 261, 401.
State v. Pratt, 28, 224, 360.
State v. President, etc., of Ohio & M. R. Co., 83.
State v. Presnell, 94.
State v. Primm, 424, 426.
State v. Pritchard, 450.
State v. Pritchett, 65.
State v. Probasco, 94.
State v. Pugh, 62, 270.
State v. Pugsley, 123.
State v. Pulle, 22, 36, 37, 156.
State v. Purdie, 46.
State v. Purdy, 449.
State v. Quigley, 75.
State v. Railroad Co., 83.
State v. Rainsbarger, 210.
State v. Rankin, 399, 400.
State v. Rawles, 255, 265, 266.
State v. Reavis, 256.
State v. Reddick, 357.
State v. Reed, 250.
State v. Reedy, 418.
State v. Reese, 57.
State v. Reid, 296.
State v. Reidell, 71, 75.
State v. Renfrow, 212.
State v. Reonnals, 490.
State v. Reynolds, 233.
State v. Rheams, 200.
State v. Richards, 66.
State v. Richardson, 284.
State v. Riddle, 71.
State v. Ridley, 358.
State v. Riebe, 393.
State v. Ring, 356.
State v. Rivers, 315.
State v. Roane, 177, 180, 233.
State v. Roanoke R. & Lumber Co., 83.
State v. Robbins, 462.

[The figures refer to pages]

State v. Roberts, 120, 222.
State v. Robinson, 77, 79, 382, 384, 394.
State v. Robitshek, 39.
State v. Rollins, 12, 277, 280, 281.
State v. Romans, 422.
State v. Roper, 348, 401.
State v. Rorebeck, 283.
State v. Rose, 401.
State v. Roseman, 270.
State v. Ross, 119.
State v. Rouch, 38.
State v. Row, 184.
State v. Rowe, 298.
State v. Rowley, 157.
State v. Ruhl, 94, 95, 284.
State v. Rushing, 381.
State v. Rutherford, 178, 180.
State v. Ryan, 33.
State v. St. Clair, 380.
State v. Sales, 436.
State v. Sampson, 289, 300.
State v. Samuel, 224.
State v. Sanders, 414.
State v. Sandford, 235.
State v. Sandy, 288.
State v. Sansone, 225.
State v. Sarvis, 291.
State v. Sasse, 94.
State v. Savoye, 158.
State v. Scates, 170.
State v. Schaefer, 74.
State v. Scheele, 185, 223.
State v. Schingen, 79.
State v. Schlottman, 454.
State v. Schulz, 233.
State v. Scott, 46, 70, 200, 258, 343.
State v. Scripture, 295, 297.
State v. Seagler, 339.
State v. Sears, 262, 264.
State v. Setter, 46, 156.
State v. Shaw, 37, 308.
State v. Shee, 103.
State v. Shelledy, 212.
State v. Shepard, 46, 248, 262, 264, 265.
State v. Sherman, 34.
State v. Shermer, 346.
State v. Sherwood, 408.
State v. Shields, 244, 250, 258.
State v. Shipman, 255, 265, 266.
State v. Shippey, 66, 188, 197, 198, 225.
State v. Shooter, 157.
State v. Shores, 302.
State v. Shroyer, 261.
State v. Shupe, 442, 443, 447.
State v. Shurtliff, 111, 388.
State v. Sias, 353.
State v. Sigman, 270.
State v. Simmons, 241.
State v. Simons, 442.
State v. Slagle, 429.
State v. Slingerland, 346.
State v. Sloan, 182.
State v. Smily, 463, 464.
State v. Smith, 10, 13, 43, 44, 53, 93, 170, 171, 172, 185, 187, 189, 199, 208, 210, 212, 213, 235, 265, 336, 372, 381, 384, 390, 391, 415, 445.
State v. Sneff, 13, 304.
State v. Snow, 458.
State v. Snyder, 93, 399.
State v. Somerville, 314.
State v. Sommers, 408.
State v. Sopher, 76.
State v. Sorenson, 73, 200, 295.
State v. South, 341.
State v. Southall, 370.
State v. Spangler, 207.
State v. Spaulding, 214, 220, 223, 355.
State v. Spencer, 74.
State v. Spiegel, 288, 289.
State v. Stalcup, 455.
State v. Stanley, 365.
State v. Stanton, 58.
State v. Starling, 74.
State v. Stephen, 389.
State v. Stevens, 40.
State v. Stevenson, 431.
State v. Stewart, 148, 160.
State v. Stickley, 73.
State v. Stickney, 13.

[The figures refer to pages]

State v. Stike, 129.
State v. Stone, 260, 283, 286, 368, 369.
State v. Stout, 415.
State v. Stow, 484.
State v. Stoyell, 284.
State v. Stratton, 393, 394.
State v. Straw, 157, 456.
State v. Stroll, 362.
State v. Sudduth, 244.
State v. Sullivan, 196.
State v. Summers, 414.
State v. Sumner, 364, 457, 459.
State v. Sutton, 281.
State v. Swails, 145, 265.
State v. Swift, 66.
State v. Symmes, 198.
State v. Syphrett, 465.
State v. Taberner, 353.
State v. Tatro, 80.
State v. Taylor, 118, 185, 273, 308, 387, 400.
State v. Thaden, 363.
State v. Thatcher, 369.
State v. Thomas, 210.
State v. Thompson, 94, 178, 181, 183, 200, 201, 242.
State v. Thornburg, 390.
State v. Thornton, 40.
State v. Tice, 62.
State v. Tilman, 246.
State v. Timmens, 425.
State v. Toole, 290, 401.
State v. Trexler, 375.
State v. Tripp, 274.
State v. Trolson, 359.
State v. Trout, 74.
State v. Tull, 10.
State v. Turlington, 178.
State v. Turner, 130.
State v. Twogood, 37.
State v. Umble, 128.
State v. Underwood, 490.
State v. Vadnais, 47.
State v. Vail, 39.
State v. Vance, 179, 188, 233.
State v. Vanderbilt, 271.
State v. Vicknair, 422.
State v. Vincent, 139.
State v. Vines, 233.
State v. Wadsworth, 136.
State v. Wallace, 411.
State v. Waller, 401.
State v. Walsen, 8.
State v. Ward, 247, 297, 342.
State v. Warren, 288, 289, 396.
State v. Warren R. Co., 84.
State v. Washington, 395.
State v. Watson, 242.
State v. Watts, 383.
State v. Weatherby, 411, 413.
State v. Weatherspoon, 499.
State v. Weber, 131.
State v. Welch, 33, 53, 76, 79.
State v. Wellman, 314, 339, 346.
State v. Wells, 356.
State v. Welsh, 245.
State v. West, 39, 40, 336.
State v. Westfall, 191.
State v. Whaley, 280.
State v. Wheeler, 386, 387, 392, 423.
State v. Whipple, 498.
State v. Whitcomb, 413.
State v. White, 51, 260, 357.
State v. White Oak River Corp., 83.
State v. Whittemore, 445.
State v. Whyte, 339.
State v. Wiggin, 136.
State v. Wilcox, 384.
State v. Wilkerson, 365, 367.
State v. Wilkinson, 284.
State v. Willard, 369.
State v. Williams, 4, 103, 172, 301, 370, 396, 401, 421, 463.
State v. Williamson, 314, 357, 384.
State v. Willis, 295.
State v. Willson, 387.
State v. Wilson, 143, 144, 294, 295, 297, 411, 441.
State v. Windsor, 68, 71.
State v. Winthrop, 167.
State v. Wisdom, 339.
State v. Wolf, 114, 399.
State v. Wolfenberger, 289.
State v. Wood, 170.

[The figures refer to pages]

State v. Workman, 274.
State v. Wray, 106, 277.
State v. Wright, 246.
State v. Wyatt, 442.
State v. Wyckoff, 487.
State v. Wyman, 418.
State v. Wymberly, 443.
State v. Yanz, 225.
State v. York, 342.
State v. Young, 370, 387, 390, 394, 430.
State v. Younger, 155, 157.
State v. Yturaspe, 258.
State v. Zelbart, 123.
State v. Zeigler, 182.
State v. Zichfeld, 96, 409.
State of North Carolina v. Gosnell, 175.
Staten v. State, 178, 191.
Steadman v. State, 302.
Stedman's Case, 221.
Steel v. State, 34.
Stegar v. State, 377.
Steinert v. Sobey, 39.
Steinmeyer v. People, 197.
Stephens v. Myers, 265.
Stephens v. State, 277.
Stepp v. State, 343.
Stern v. State, 94.
Stetson v. Faxon, 402.
Stevens v. Com., 292.
Stevens v. People, 109, 136.
Stevens v. State, 69, 71, 258, 260, 347.
Stewart v. State, 183, 200, 221, 389, 501.
Stewart v. Waterloo Turn Verein, 84.
Stinson v. People, 490.
Stoffer v. State, 200, 201, 202.
Stokes v. People, 33, 215.
Stone v. People, 500.
Stone v. State, 270.
Stoneman v. Com., 183, 197.
Stoops v. Com., 123, 124.
Storey v. State, 179, 201.
Stoughton v. State, 399.
Stout v. Keyes, 22.
Stout v. State, 488.
Strang v. People, 243, 247, 251.
Stratton v. State, 100.
Stringfellow v. State, 172.
Stripling v. State, 255.
Stuart v. Com., 498.
Stuart v. People, 22.
Studstill v. State, 233.
Stump v. McNairy, 403.
Stupetski v. Transatlantic Fire Ins. Co., 288, 300.
Stupp, In re, 485.
Sturtevant v. Com., 32.
Sullivan v. State, 199, 203, 290.
Sutcliffe v. State, 501.
Suther v. State, 425.
Swan v. Williams, 31.
Sweat v. State, 377.
Swincher v. Com., 89.
Swindle v. State, 465.
Sylvester v. State, 258.

T

Tanner v. Com., 330.
Tapscott v. Com., 205.
Tarver v. State, 145, 266, 267.
Tate v. State, 112.
Tatnall v. Courtney, 274.
Taylor v. Com., 364.
Taylor v. State, 149, 168, 243, 250, 262, 350, 418, 460.
Teague v. State, 92.
Teat v. State, 499.
Terrell v. State, 241.
Terrett, In re, 387.
Terrill v. State, 77.
Territory v. Barth, 389.
Territory v. Catton, 219.
Territory v. Crozier, 384.
Territory v. Doty, 31.
Territory v. Evans, 28.
Territory v. Gomez, 258.
Territory v. Hart, 210.
Territory v. Jaspar, 416.
Territory v. Keyes, 148, 246, 261, 266, 277.
Territory v. McKern, 374.

[The figures refer to pages]

Territory v. Manton, 210, 235.
Terry v. Com., 392.
Thacker v. Belcher, 433.
Thalheim v. State, 9.
Thatcher v. State, 401.
Thomas, Ex parte, 28, 412.
Thomas v. Cincinnati, N. O. & T. P. R. Co., 165.
Thomas v. Com., 280.
Thomas v. People, 236.
Thomas v. State, 266, 363, 376, 417.
Thomas v. Thomas, 316.
Thompson v. Com., 376.
Thompson v. Crocker, 486.
Thompson v. Stacey Clarke, The, 272.
Thompson v. State, 13, 200, 304, 377, 391, 409.
Thompson v. U. S., 184.
Thompson v. Utah, 31, 34.
Thurman v. State, 51, 67.
Thurmond v. State, 396.
Timmons v. State, 296.
Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 163.
Tolliver v. State, 381.
Tom v. State, 214.
Tomson's Case, 214.
Trogdon v. State, 199.
True v. Com., 114.
Tuberville v. Savage, 264.
Tucker v. State, 11.
Tucker v. U. S., 79.
Tudor v. Com., 127.
Tully, In re, 387, 390.
Tully v. Com., 125.
Turpin v. State, 456.
Turner v. People, 247.
Turner v. State, 162.
Tuttle v. People, 444.
Tyler v. People, 330, 477, 479, 483, 485, 489.
Tyson, In re, 32.

U

Ulmer v. State, 123.
Ulrich v. Com., 93.
Umphrey v. State, 342.
Union Colliery v. Queen, 86.
U. S. v. Addyston Pipe & Steel Co., 164.
U. S. v. Adler, 163.
U. S. v. Anthony, 88.
U. S. v. Arjona, 28, 476.
U. S. v. Atkins, 444.
U. S. v. Babcock, 444.
U. S. v. Barnhart, 393, 500.
U. S. v. Bedgood, 442.
U. S. v. Bevans, 479.
U. S. v. Beyer, 272.
U. S. v. Boyd, 112.
U. S. v. Boyer, 448.
U. S. v. Burr, 470.
U. S. v. Cannon, 407.
U. S. v. Carll, 36, 396.
U. S. v. Carpenter, 163.
U. S. v. Carr, 101.
U. S. v. Cassidy, 160, 165.
U. S. v. Coal Dealers' Ass'n of California, 165.
U. S. v. Conner, 444.
U. S. v. Coolidge, 28.
U. S. v. Crane, 123.
U. S. v. Crow Dog, 215.
U. S. v. Davis, 311, 486.
U. S. v. De Bare, 379.
U. S. v. Debs, 165.
U. S. v. Drew, 76, 77.
U. S. v. Durkee, 346.
U. S. v. Eaton, 26.
U. S. v. Elliott, 165.
U. S. v. Farnham, 233.
U. S. v. Faulkner, 66, 75.
U. S. v. Fox, 60.
U. S. v. Fullhart, 270.
U. S. v. Garcelon, 442.
U. S. v. Gideon, 383.
U. S. v. Gilliam, 190.
U. S. v. Greenhut, 164.
U. S. v. Greiner, 100.
U. S. v. Grush, 479.
U. S. v. Guiteau, 488.
U. S. v. Gunther, 241.
U. S. v. Hand, 254.
U. S. v. Hanway, 470.

[The figures refer to pages]

U. S. v. Harmon, 51.
U. S. v. Hartwell, 34.
U. S. v. Haskell, 100.
U. S. v. Heath, 198, 234.
U. S. v. Holmes, 73, 105, 482.
U. S. v. Hoxie, 470, 471.
U. S. v. Hudson, 26, 28, 492.
U. S. v. Imbert, 482.
U. S. v. Insurgents, 470.
U. S. v. Irvine, 4.
U. S. v. Jackson, 443.
U. S. v. Jellico Mountain Coal & Coke Co., 164.
U. S. v. John Kelso Co., 85.
U. S. v. Jones, 101, 374.
U. S. v. Kagama, 31.
U. S. v. Keller, 233.
U. S. v. King, 227.
U. S. v. Lancaster, 155, 156, 161.
U. S. v. Long, 386, 395, 397.
U. S. v. McGlue, 66, 77.
U. S. v. Manion, 441.
U. S. v. Martin, 492.
U. S. v. Meagher, 193.
U. S. v. Memphis & L. R. R. Co., 87.
U. S. v. Mitchell, 470.
U. S. v. Moore, 387, 444.
U. S. v. Morris, 34.
U. S. v. Myers, 255.
U. S. v. Nelson, 164.
U. S. v. Newton, 163.
U. S. v. Ortega, 254.
U. S. v. Owen, 163.
U. S. v. Palmer, 482.
U. S. v. Passmore, 444.
U. S. v. Perez, 501.
U. S. v. Philbrick, 38.
U. S. v. Pirates, 482.
U. S. v. Pryor, 470.
U. S. v. Ramsay, 3.
U. S. v. Reichert, 164.
U. S. v. Rice, 44, 175, 176, 213.
U. S. v. Ridgeway, 68.
U. S. v. Small, 258.
U. S. v. Smith, 356, 464, 475.
U. S. v. Snow, 417.
U. S. v. Stanley, 444.
U. S. v. Stephens, 142.
U. S. v. Stevens, 163.
U. S. v. Sweeney, 162.
U. S. v. Taylor, 233.
U. S. v. Terry, 103.
U. S. v. Trans-Missouri Freight Ass'n, 164, 165.
U. S. v. Van Schaick, 86.
U. S. v. Vigol, 100.
U. S. v. Wiltberger, 34, 188, 482.
U. S. v. Workingmen's Amalgamated Council, 165.
U. S. v. Worrall, 152.
U. S. v. Ybanez, 476.
Unseld v. Com., 300.
Updegraph v. Com., 25.
Upstone v. People, 76.

V

Valentine v. State, 204.
Vanderpool v. State, 279.
Van Dusen v. People, 442.
Van Fossen v. State, 409.
Van Houten v. State, 401.
Van Meter v. People, 109.
Vanvactor v. State, 271.
Varnell v. State, 180, 204.
Vaughan v. State, 96, 414.
Veatch v. State, 502.
Vidal v. Girard, 25.
Village of St. Johnsbury v. Thompson, 109.
Vince v. State, 436.
Vincennes University v. Indiana, 31.
Vincent, Ex parte, 300.
Vollmer v. State, 214.

W

Wade v. State, 123, 126.
Wagner v. State, 77.
Wagoner v. State, 252.
Waites' Case, 320.
Wakefield v. State, 350.
Walker v. People, 75.
Walker v. State, 167, 295, 299, 442.

[The figures refer to pages]

Walker v. Winn, 464.
Wall v. State, 350.
Wallace v. State, 167, 281.
Wallace v. U. S., 183, 188.
Waller v. State, 250.
Wallis v. State, 355, 359.
Walls v. State, 148, 260.
Walrath v. State, 122.
Walsh v. People, 153, 449.
Walter v. People, 33, 247.
Walters v. State, 335.
Walton v. State, 302.
Wampler v. State, 337, 340.
Ward v. People, 14, 109, 311, 312, 315.
Ward v. State, 309, 339.
Warden v. State, 119, 346.
Ware v. State, 265.
Warren v. State, 309.
Wartena v. State, 66.
Wash v. Com., 396.
Washington v. State, 289, 446.
Waterbury v. Newton, 93.
Waterhouse v. Comer, 163.
Waterman v. People, 390.
Waterman v. State, 357.
Watkins v. State, 186.
Watson v. People, 365.
Watson v. State, 113, 440, 490.
Watts v. State, 121.
Weatherford v. State, 214.
Weaver v. People, 260.
Weaver v. State, 499.
Weaver v. Ward, 267.
Webb, Ex parte, 462.
Webb v. State, 412.
Wellar v. People, 208, 210, 212.
Wells v. Abrahams, 9.
Wells v. State, 388.
Wenz v. State, 81.
West v. Kurtz, 433.
Weston v. State, 499.
Whalen v. Com., 300.
Wheeler v. Com., 374.
Wheeler v. State, 4.
Whippen v. Whippen, 414.
Whitcher v. State, 151, 277.
White v. Com., 386.
White v. Fort, 8.
White v. Hass, 394.
White v. People, 114, 115, 125.
White v. Spettigue, 9.
White v. State, 204, 296, 297, 341.
White v. Wagar, 390.
White v. Washington Territory, 189, 196.
Whitehead v. State, 123.
Whiting v. State, 380.
Whitney v. State, 243.
Whittaker v. State, 243, 247.
Whitten v. State, 180.
Whitton v. State, 88.
Whorley v. State, 124.
Wilbur v. Crane, 35.
Wilcox v. State, 70.
Wild's Case, 187, 274.
Wildenhus' Case, 481.
Wildey v. Crane, 434.
Wilkerson v. State, 204.
Wilkinson's Case, 337.
Willey v. Carpenter, 274.
Willey v. State, 231.
Williams v. Com., 501.
Williams v. Dickenson, 9.
Williams v. State, 10, 73, 81, 92, 94, 113, 116, 119, 147, 162, 199, 221, 226, 250, 252, 294, 302, 328, 339, 346, 365, 374, 393, 395, 422, 430, 446, 462.
Williams v. U. S., 450.
Williamson v. Sammons, 433.
Willis v. Com., 76, 79.
Willis v. State, 186, 292.
Wills v. State, 201.
Wilson v. People, 258, 260, 346.
Wilson v. State, 258, 318, 460, 461, 501.
Winslow v. Central Iowa Ry. Co., 434.
Winsor v. Reg., 501.
Winter v. State, 136.
Wixson v. People, 111, 112, 113.
Wolf v. State, 339.
Wolfington v. State, 330.

[The figures refer to pages]

Wolfstein v. People, 336, 337.
Wolverton v. Com., 310.
Wong v. Astoria, 40.
Wood v. People, 445, 446.
Wood v. State, 79, 275, 424, 427.
Woodbury v. State, 369.
Woods v. People, 250.
Woods v. State, 377, 384.
Woodward v. State, 385.
Woolsey v. State, 287.
Woolweaver v. State, 117, 239.
Worthington v. State, 490.
Wren v. Com., 125.
Wright, In re, 33.
Wright v. Com., 185.
Wright v. Moore, 404.
Wright v. People, 258.
Wright v. State, 177, 384, 428, 498, 500, 501.
Wright's Case, 11, 276, 374.
Wusnig v. State, 62.
Wyatt v. State, 248.
Wylie v. Elwood, 400.

Y

Yates v. People, 223.
Yong's Case, 214.
York's Case, 63.
Young v. State, 150, 182.
Yundt v. People, 231.

Z

Zabriskie v. State, 425.

INDEX

[THE FIGURES REFER TO PAGES]

A

ABANDONMENT,
By principal in second degree, 117.
By accessary before the fact, 122.
Of attempt, 150.
Of conspiracy, 162.
Of stolen property, 343.
Of attack, 198, 201, 202.

ABETTORS,
See Principals and Accessaries.

ABDUCTION,
Defined and explained, 282.
See, also, Assaults; False Imprisonment; Kidnapping; Seduction.

ABORTION,
Defined, 428.
Not homicide at common law, 167.
Homicide in committing, manslaughter, 231.
Murder, 212.

ACCESSARIES,
See Principals and Accessaries.

ACCIDENT,
As ground of exemption from responsibility, 97.
For homicide, 192.
For assault, 267, 269.

ACCOMPLICE,
Defined, 127, 128, note.
See Principals and Accessaries.

ACT,
Necessity for, 54, 60, 138, 254.

ACTION,
Civil and criminal proceedings for same wrong, 8.

[The figures refer to pages]

ADULTERY,
Defined, 410.
Distinguished from rape, 414.
Effect of divorce, 413.
Belief in divorce, 88, 413.
Belief in death of first spouse, 96, note.
Effect of religious views, customs, etc., 413.
Emission not necessary, 414.
Who may institute prosecution, 415.
Living in, 416.
As provocation to husband for homicide, 224.
Solicitation to commit, 153.
Condonation of, 10.

AFFRAY,
Defined and explained, 458.
Homicide to suppress, 177.

AGE,
Of consent, 246.
Presumption from age as to capacity to commit crime, 61, 251.

AGENCY,
See Principals and Accessaries; Principal and Agent.

AGGRAVATED ASSAULT,
See Assaults.

AIDER AND ABETTOR,
Defined, 113, 119, 127.
See Principals and Accessaries.

ALIENS,
See Jurisdiction.

ALTERATION,
Of instruments, see Forgery.

AMBASSADORS,
Not subject to the laws, 495.
Violence to, 476, 493.

ANIMUS FURANDI,
See Larceny.

ARREST,
Homicide in making, 173, 175, 214.
Assault in making, 272.
Homicide in resisting, murder, 206, 213.
Manslaughter, 223.
As justification of criminal act, 98.
Of assault, 270.
See, also, Assaults; False Imprisonment.

[The figures refer to pages]

ARSON,
Defined, 287.
Elements of the crime, 287.
A felony, 287.
The burning, 287.
Character of house, 288.
Ownership of house, 289.
Malice, 291.
Statutory burnings, 293.

ASPORTATION,
See Larceny; Robbery.

ASSAULTS,
Defined, 252.
Battery defined, 253, 256.
Battery distinguished from, 256.
Consent to, 11, 275.
Common and aggravated, 252, 257.
Sufficiency of overt act, 254.
False imprisonment as, 278.
Aggravated assaults, specific intent, 257.
Intention to injure, 262.
Ability to injure, 265.
Justification and excuse, 269.
Self-defense, 272.
Defense of others, 272.
In resisting trespass, 273.
In recapturing property, 273.
Resisting unlawful arrest or imprisonment, 272.
Ejecting trespasser, 273.
By railroad employé, 271.
By teacher on pupil, 270.
Officer, 270.
By husband on wife, 271.
By master on servant or apprentice, 271.
By master of vessel on seaman, 272.
For abusive words, 274.
Consent of person assaulted, 2, 11, 275.
As provocation for homicide, 221.
Duty to retreat from, 272.
Merger in felony, 45.
See, also, Abduction; Attempts; Kidnapping; Mayhem.

ASSISTANCE,
See Principals and Accessaries.

ATTEMPTS,
Defined, 138, 139.
Distinction between intent and, 139.

[The figures refer to pages]

ATTEMPTS—Continued,
Preparation, not attempt, 140.
Effect of consent, 138, 150.
Specific intent necessary, 138, 148.
Possibility to commit crime, 138, 142.
Inability in law, 146.
Are misdemeanors, 139.
Sufficiency of overt act, 139.
Voluntary abandonment, 150.
AUTREFOIS ACQUIT OR CONVICT,
Explained, 497.

B

BAILEES,
Larceny by, 321.
See, also, Embezzlement.
BAR,
Civil action as bar to prosecution, 8.
BARRETRY,
Defined and explained, 432.
BATTERY,
See Assaults.
BESTIALITY,
Defined, 421.
Essentials, 421.
Felony or misdemeanor, 422.
BETTING,
At elections, 473.
BIGAMY OR POLYGAMY,
Defined, 406.
Validity of second marriage, 407.
Effect of divorce, 409.
Honest belief in divorce, 88, 409.
Validity of prior marriage, 408.
Belief in death of first spouse, 95, 410.
Religious belief and duty, 88, 410.
BLASPHEMY,
As a crime, 26.
As a nuisance, 401.
Blasphemous libels, 468.
BOUNDARIES,
See Jurisdiction.
BRAWLERS,
As nuisance, 401.

[The figures refer to pages]

BREACH OF PEACE,
In general, 453 et seq.
Consent to, 2.

BREACH OF PRISON,
Defined and explained, 437, 438.

BREACH OF TRUST,
By officer, 450.
See Embezzlement.

BRIBERY,
Defined and explained, 447.

BUGGERY,
Defined, 421.
Essentials, 422.
Felony or misdemeanor, 422.

BURDEN OF PROOF,
Of insanity, 73.

BURGLARY,
Defined, 294.
Elements of the crime, 294.
A felony, 294.
The breaking, 294.
Constructive breaking, 297.
The entry, 298.
Character and occupancy of premises, 300.
Nighttime, 301.
The intent, 302.
Consent to breaking and entry, 13, 303.
Consent obtained by fraud, 297.
Statutory changes, 303.

BURNING,
See Arson.

C

CAPACITY,
To commit crime, see Corporations; Drunkenness; Infancy; Insanity.

CARELESSNESS,
See Negligence.

CARNAL KNOWLEDGE,
See Rape.

CAUSE OF DEATH,
See Homicide.

CHALLENGE,
To fight duel, 455.

CHAMPERTY,
Defined and explained, 432.

CHANCE,
See Accident.

CHEATS,
When punished at common law, 7.
At common law, defined, 360.
Distinguished from false pretenses, 362.
A misdemeanor, 360.
By false pretenses, defined, 362.
Elements of the crime, 362.
Distinguished from common-law cheats, 362.
Purpose of statutes, 363.
The false representations, 363 et seq.
Expressions of opinion, 365.
Puffing statements, 365.
Statements as to future, 363 et seq.
Statements as to quantity, 366.
Statements as to quality, 365, 366.
Form of statement, 366.
Knowledge of falsity, 367.
Remoteness of pretense, as inducement to pay debt, 369.
Must be false in fact, 371.
Intent, 367, 372.
Person must be in fact defrauded, 369.
Reliance on representations, 368.
Credulity of person defrauded, 370.
Fraudulent intent of person defrauded, 14, 371.
Condonation, no defense, 9.
Property subject of, 371.

CHILD,
Capacity to commit crime, 61.

CHILDREN,
See Infancy.

CHRISTIANITY,
As part of common law, 25, 235.
See Blasphemy; Morality; Nuisance.

CODE,
Penal codes, 37.

COERCION,
As justification of criminal act, 102.
See Necessity and Compulsion; Husband and Wife.

COHABITATION,
See Adultery; Fornication; Illicit Cohabitation; Incest; Miscegenation.

[The figures refer to pages]

COMBINATIONS,
To do unlawful act, see Conspiracy.

COMMAND,
As justification of criminal act, 101.

COMMON ASSAULT,
See Assaults.

COMMON BARRETRY,
Defined and explained, 432.
As nuisance, 401.

COMMON BRAWLERS,
As nuisance, 401.

COMMON LAW,
Defined and explained, 20.
In the United States, 19, 21, 491, 492.
No common-law crimes against the United States, 19, 26, 492.
English common-law authority not essential, 23.
Prohibits as well as punishes, 24.
Morality and Christianity, 25.
In connection with statutes, 35, 37.
With penal codes, 37.
When repealed by statute, 37.

COMMON SCOLD,
As nuisance, 401.

COMPOUNDING CRIME,
Defined and explained, 440.

COMPOUND LARCENY,
See Larceny.

COMPULSION,
See Necessity and Compulsion.

CONDONATION,
By person injured by crime, 9, 415.

CONGRESS,
See Jurisdiction; Statutes.

CONSENT,
Of person injured by crime, in general, 10.
Obtained by fraud or threats, 12, 243, 247.
To attempt, 138, 150.
To assault, 275.
To imprisonment, 281.
To breaking and entry, burglary, 297, 303.
To taking property, see Larceny; Robbery.
Of woman, rape, 243, 245 et seq., 261.
To abortion, 430.

CONSENT—Continued,
To abduction, 285.
To kidnapping, 281.
Person incapable of consenting, 12.
Entrapment as consent, 12.

CONSPIRACY,
Defined, 154.
Requisites in general, 154.
Overt act not necessary, 154, 155, 156.
Formal agreement not necessary, 155.
Number of persons necessary, 155.
Character of acts contemplated, 156 et seq.
Prejudice to public generally, monopolies, trades unions, 159.
Against public justice and public peace, 160.
Community of unlawful purpose, 115, 120.
Liability of co-conspirators, 162.
Repentance and withdrawal, 117, 122, 162.
A misdemeanor, 154.
Merger in completed crime, 45, 163.
Statutory regulations, including federal statutes, 163.
Seditious conspiracy, 472.

CONSTITUTION,
Powers conferred on congress, 27.
Restrictions of federal constitution, 29.

CONSTRUCTION,
Of statutes, 34.

CONSTRUCTIVE INTENT,
See Criminal Intention.

CONSTRUCTIVE POSSESSION,
See Larceny.

CONSULS,
Are subject to the laws, 496.

CONTEMPT,
Corporation may be punished, 82, 87.

CONTRIBUTORY NEGLIGENCE,
Of person injured or killed, 15, 238.

CORPORATIONS,
Capacity to commit crime, 82.
Criminal responsibility, 82 et seq.
For misfeasance, 83.
For nonfeasance, 82.
For nuisance, 83.
For crimes involving specific intent, 85.
Malice not imputable, 86.
May be guilty of contempt of court, 82, 87.

[The figures refer to pages]

CORPUS DELICTI,
Proof of homicide, 172.

COUNTERFEITING,
Uttering counterfeit money, wrong of person receiving it, 14.
See Forgery.
Stamps, 473.

COUNTIES,
See Jurisdiction.

COURTS,
See Jurisdiction.

COVERTURE,
See Husband and Wife.

CRIME,
Defined, 1, 50, note.
Nature of crime, 1.
Public policy the ground of punishment, 2, 3, 4.
Civil and criminal proceedings for same wrong, 2, 8.
Condonation and settlement by person injured, 2, 9.
Consent of person injured, 2, 3, 10.
Entrapment into crime, 212.
Prohibition by law essential, 5.
Want of consent as essential ingredient, 2.
Wrong or negligence of person injured, 3, 14.
Public policy the ground of punishment, 4.
Public injury essential, 4, 5, 6.
Distinguished from tort, 6, 9, 15.
Mental element, 15.
Trifling offenses not noticed, 5, 6, 156.
Criminal prosecution to enforce debt, 7, note.
Compounding felony, 10.
May be one of omission, 16, 403.
Punishability not an absolute test, 16.
Indictability not an absolute test, 17.
Mala in se and mala prohibita, 18.
No common-law crimes against United States, 19, 26.
Statutory crimes, 27, 35, 90.
Ignorance or mistake of fact as defense, 90.
Penal codes, 37.
Classification of crimes, 41.
Felonies and misdemeanors, 42
Criminal intent, 15, 48.
Specific intent an essential element, 54.
Concurrence of act and intent essential, 60.
Exemptions from liability, 61.
Persons capable of committing, 61.
Capacity of corporation to commit, 82.

[The figures refer to pages]

CRIME—Continued,
Justification, 98 et seq.
Parties concerned in the commission of crimes, 108.
Overt act necessary, 60, 138.
Criminal responsibility as affected by infancy, 61.
As affected by insanity, 64.
Ignorance or mistake of law no defense, 87.
Common-law offense, ignorance or mistake of fact as defense, 90.
See Attempts; Consent; Criminal Intention; Common Law; Criminal Law; Statutes.

CRIME AGAINST NATURE,
See Sodomy.

CRIMINAL INTENTION,
Defined, 46 et seq.
An essential element in crime, 15, 46 et seq.
Distinguished from malice, 49.
From motive, 50.
Specific intent, 54.
Natural consequences of act presumably intended, 52.
Not punishable without overt act, 60, 138.
Constructive intent, 56, 211.
Unintended results, 56, 211.
Doctrine does not apply when specific intent necessary, 58.
Supplied by negligence, 59.
Must exist at time of act, 60, 302, 341, 346.
Not imputable to corporation, 84, 85.
Specific intent, necessary in attempts, 138, 148.
In aggravated assaults, 257.
In burglary, 302.
In statutory offenses, 91 et seq.
See Drunkenness; Infancy; Insanity; specific crimes.

CRIMINAL LAW,
How prescribed, 19.
See Common Law; Crime; Statutes.

CUSTODY,
See Larceny.

CUSTOM,
Basis of law, 20.
As defense to nuisance, 406.

D

DEADLY WEAPON,
What constitutes, 258, note.

DEATH,
Cause of, see Homicide.

[The figures refer to pages]

DEATH—Continued,
Time of, see Homicide.
Proof of, see Homicide.

DEFENSE,
Of others, 191, 205, 221, 272.
See Assaults; Homicide; Property.

DEFINITIONS,
See specific titles.

DELIRIUM TREMENS,
See Drunkenness.

DELUSIONS,
See Insanity.

DEMENTIA,
See Insanity.

DE MINIMIS NON CURAT LEX,
Application of maxim, 5.

DETECTIVES,
Entrapment into crime, 12, note, 117.

DIPSOMANIA,
See Drunkenness.

DISORDERLY HOUSE,
As a nuisance, 401.

DRUGS,
Administering, an assault, 256, 277.
A battery, 257.
To effect abortion, 430.

DRUNKENNESS,
As exempting from responsibility, 76 et seq.
Voluntary, ordinarily no defense, 76.
Otherwise where delirium tremens results, 77.
Does not aggravate crime, 77.
Materiality as reducing homicide to manslaughter, 80.
May negative essential specific intent, 76, 78, 345.
Dipsomania, 81.
Resulting from unsuspected susceptibility, 82.
Involuntary, a good defense, 76, 81.
As a nuisance, 77, 401.
Mistake of fact, due to, 81.

DUELING,
Challenge as a crime, 455.

DURESS,
As justification of criminal act, 98, 99, 471.

[The figures refer to pages]

DWELLING,
In arson, 288.
In burglary, 300.

E

EAVESDROPPING,
As a nuisance, 401.

ELECTIONS AND VOTERS,
Abuse of elective franchise, 473.

EMBEZZLEMENT,
Defined, 351.
As statutory crime, 7, 351.
Settlement with owner no defense, 10, note, 359.
Distinguished from larceny, 321, 325, 351.
Purpose of statutes, 351 et seq.
Who are within the statutes, 353.
Scope of statutes, 353.
By public officers, 357, 450, 451.
By joint owner, 357.
From bailee, 357.
Breach of trust as element of the crime, 357.
Fraudulent intent essential, 359.
See, also, Receiving Stolen Goods.

EMBRACERY,
Defined and explained, 436.

EMOTIONAL INSANITY,
See Insanity.

ENEMIES IN WAR,
Not subject to the laws, 495.
Aiding, 471.

ENGROSSING,
Explained, 473.

ENTRAPMENT,
Into crime, 12, 117.
Not a defense, 3, 12.
Community of purpose, 117.

ESCAPE,
Defined and explained, 437.
Preventing, as justification for criminal act, 98.
Homicide to prevent, 173, 175.

EXCUSABLE HOMICIDE,
See Homicide.

EXCUSE,
Distinguished from justification, 173.

[The figures refer to pages]

EXCUSE—Continued,
For injury to property, 384.
For assault, see Assaults.
For homicide, see Homicide.

EXECUTION,
Of criminals, 174.

EXEMPTIONS FROM RESPONSIBILITY,
See Accident; Corporations; Drunkenness; Ignorance or Mistake of Fact; Ignorance or Mistake of Law; Infancy; Insanity; Married Women; Necessity and Compulsion; Provocation.

EX POST FACTO LAWS,
What are, 31.

EXPOSURE,
As an assault, 256.

EXPRESS MALICE,
See Murder.

EXTORTION,
By officer, 450.
Consent, 12.

F

FACT,
Ignorance or mistake of fact, 90 et seq.

FALSE IMPRISONMENT,
Defined, 278.
As provocation for homicide, 222.
What is imprisonment, 278.
When imprisonment false, 279.
See, also, Abduction; Assaults; Kidnapping.

FALSE PRETENSES,
See Cheats.

FALSE TOKENS,
See Cheats.

FEAR,
Effect of, in reducing grade of crime, 101, note.

FEDERAL COURTS,
See Jurisdiction.

FELONIES,
What are, 42.
Compounding, 10, 440.
Distinguished from misdemeanor, 43, 44.
Merger of offenses, 45.
Corporation cannot be guilty, 86.
Distinction between principals and accessaries, 43, 109.

FELONIES—Continued,
What are, at common law, see specific crimes.
Homicide to prevent, 174, 178.
Misprision of felony, 440.

FELONIOUS HOMICIDE,
See Homicide; Manslaughter; Murder; Suicide.

FEME COVERT,
See Husband and Wife.

FIGHTING,
See Affray; Dueling.

FINDING LOST PROPERTY,
See Larceny.

FORCIBLE ENTRY AND DETAINER,
Defined and explained, 461.

FOREIGN COUNTRIES,
See Jurisdiction.

FOREIGN SOVEREIGNS,
Not subject to the laws, 495.

FORESTALLING,
Explained, 473.

FORGERY,
Defined, 385.
Elements of the crime, 385.
A misdemeanor, 385.
The making and signing of the instrument, 385 et seq.
By agent, 387, 388.
Character of the instrument, 336, 383, 389.
Legal efficacy of instrument, 338, 391.
Alterations and erasures, 393.
The intent, 394.
Need not in fact defraud, 395.
Of foreign securities, 476.
Possession of forged note, 397.
Uttering forged instrument, 388, 396.

FORGIVENESS,
By person injured by crime, 9, 415.

FORMER JEOPARDY,
Defined and explained, 497.
What constitutes, 498.
Jurisdiction, 499.
Discharge of jury, 500.
Identity of offenses, 502.
Waiver by defendant, 501.
Prosecution under ordinance as, 40.

FORNICATION,
Defined, 415.
Living in, 416.

FRAUD,
In office, 450.
See Cheats; Embezzlement; Forgery; Larceny; Misconduct in Office; Rape.

FREE AGENCY,
See Will.

FRENZY,
See Insanity.

G

GAMES,
Assault in, 275.
See Manslaughter.

GAMING,
Gambling and gambling houses, 402.

GOVERNMENT,
Offenses against, 469.

GRAND LARCENY,
See Larceny.

H

HABITATION,
Defense of, 185.
Offenses against, see Arson; Burglary.

HEALTH,
Crimes against, 398 et seq.

HEAT OF PASSION,
See Manslaughter.

HIGH TREASON,
See Treason.

HIGHWAYS,
Obstruction as a nuisance, 402.

HOMICIDE,
Defined, 166.
Subjects of, 166.
The killing, cause of death, 167, 232.
Sole or contributing cause of death, 167, 168.
Time of death, 157, 166, 171.
Negligence of person injured, 14, 169.
Consent of person killed, 10.
Effect of drunkenness, 76.
Proof of corpus delicti, 172.

[The figures refer to pages]

HOMICIDE—Continued,
Justifiable, what amounts to justification, 173 et seq.
Distinguished from excusable, 173.
Execution of criminals, 173, 174.
In making arrest, 173, 175.
In preventing escape of prisoner, 173, 175.
In preventing rescue of prisoner, 174, 176.
In suppressing riot or affray, 177.
In preventing crime, 174, 178.
Self-defense, 175, 176, 177, 179, 181, 187.
Defense of others, 191.
Defense of habitation, 185.
Defense of property, 188.
Setting spring guns, 189.
Duty to retreat, 181, 185.
Excusable defined, 192, 194.
Distinguished from justifiable, 173.
Accident, 192.
Self-defense, 188.
Accused as aggressor, 195, 200.
Imminence of danger and necessity, 194, 196.
Duty to retreat, 194, 199, 203.
Distinguished from manslaughter, 227.
Defense of others, 205.
Knowledge that act will cause death or injury, 211.
Assault with intent to kill, 259.
Death within, from blow without, the state, 487.
See Manslaughter; Murder; Suicide.

HOUSEBREAKING,
See Burglary.

HUMAN BEING,
Subject of homicide, 166.

HUSBAND AND WIFE,
Coercion of wife by husband, 102 et seq.
Wife assisting husband to escape not accessary, 126.
Assault by husband on wife, 271.
Receiving by one of goods stolen by the other, 380.

I

IDIOCY,
See Insanity.

IGNORANCE OR MISTAKE OF FACT,
Insane delusion, 67.
As ground of exemption from responsibility, 90 et seq., 95, 178, 180, 197.

[The figures refer to pages]

IGNORANCE OR MISTAKE OF LAW,
As ground of exemption from responsibility, 87, 420, 451, 452.
Negativing specific intent, 89.

ILLICIT COHABITATION,
How and when a crime, 416.

IMBECILITY,
See Insanity.

IMPLIED MALICE,
See Murder.

IMPOSSIBILITY,
As justification for failure to perform a duty, 104.

INCEST,
Defined, 418.
Distinguished from rape, 419.

INDECENT EXPOSURE,
As a nuisance, 401.

INDECENT PRINTS,
As a nuisance, 400.

INDIANA,
Common-law crimes, 37.

INDICTMENT,
Indictability not an absolute test of crime, 17.

INFANCY,
Capacity to commit crime, 16, 61.
Incapacity arising from civil disabilities, 63.
Capacity to commit rape, 63, 251.

INSANE DELUSIONS,
See Insanity.

INSANITY,
Defined, 64 et seq.
See Drunkenness.
Presumption and burden of proof, 73.
Insane delusion result of negligence, 68.
Partial insanity or insane delusions, 64, 67.
Moral insanity, 65, 72.
Irresistible impulse, 65, 68.
Exempts one from being tried or sentenced, 65.
Ability to distinguish between right and wrong, 64, 66.
As exempting from responsibility, 64 et seq.
Emotional insanity, 65, 72.

INSTIGATION,
Solicitation to commit crime, 152.
See Principals and Accessaries.

[The figures refer to pages]

INTENT,
See Criminal Intent; also under specific crimes.
INTERPRETATION,
Of statutes, 34.
See Disorderly House.
Agent's liability for his own acts, 136.
INTOXICATING LIQUORS,
Unlawful sale, liability of principal for acts of agent, 131.
INTOXICATION,
See Drunkenness.
INVOLUNTARY ACTS,
See Will.
IOWA,
No common-law crimes, 37.
IRRESISTIBLE IMPULSE,
Exemption from responsibility for crime, 65, 68.

J

JEOPARDY,
See Former Jeopardy.
JUDGMENT,
In civil action as bar to prosecution, 8.
JURISDICTION,
Territorial limits, of states and United States, 477.
Of counties, 479.
As determined by locality of offense, 480.
Extraterritorial, in general, 480.
Offenses on shipboard, 480, 481.
Offenses by subjects abroad, 482.
Jurisdiction of states, 483.
Offenses by foreigners abroad, 484.
Jurisdiction of states, 484.
Courts sitting in foreign countries, 485.
Acts committed without, taking effect within, territorial limits, 372, 382, 480, 485.
Homicide, death within, from blow without, limits, 487.
Larceny, property stolen in one state and brought into another, 489.
Federal courts and the common law, 491.
Conferred on federal courts by congress, 493.
Persons subject to the laws, 495.
See, also, Former Jeopardy.
JUSTICE,
Offenses against, 432.

JUSTIFIABLE HOMICIDE,
See Homicide.

JUSTIFICATION,
For criminal act, 98.
Distinguished from excuse, 173.
For injury to property, 384.
For nuisance, 403.
For assault, see Assaults.
For homicide, see Homicide.
For mayhem, see Mayhem.
Burden of proving, 214.
See Coercion; Duress; Necessity.

K

KIDNAPPING,
Defined, 280.
Consent, 281.
See, also, Abduction; False Imprisonment.

L

LARCENY,
Defined, 305.
Elements of the crime, 305 et seq.
A felony, 307.
Grand and petit, 306.
Manner of the taking, 317.
Simple and compound, 349.
Consent of owner, 11, 318, 320, 332.
Entrapment as consent, 13, 335.
Negligence of owner, 14.
Property that may be stolen, 307.
Personal property, 311.
Ownership, 314.
Distinguished from embezzlement, 321, 325, 351.
From false pretenses, 332, 363.
From malicious mischief, 383.
From robbery, 373, 374.
The trespass in the taking, 317.
Possession, custody, and property distinguished, 323.
Possession necessary for trespass to attach, 318.
Possession only obtained without owner's consent, 320.
By bailees, 321.
Bailment terminated before taking, 322.
Possession fraudulently obtained animo furandi, 321.

LARCENY—Continued,
Constructive possession of owner, 323.
Possession by servant as bailee, 324.
Taking from or by servant, 323.
Custody only by others than servants, 327.
Larceny of lost property, 328.
Consent to part with "property," 332.
Property merely mislaid, 331.
Servant or agent parting with "property," 333.
Conditional parting with "property," 327.
Delivery by mistake, 336.
The caption and asportation, 337.
The intent, 341.
To use and return, 341.
Abandoning or returning property, 343.
Must exist at time of taking, 341, 346.
Lucri causa, 345.
Taking under claim of right, 89, 343.
Coexistence of act and intent, 341, 346.
Continuing trespass, 348.
Compound larcenies, 349.
Property stolen in one state and brought into another, 489.
See, also, Receiving Stolen Goods.

LASCIVIOUS COHABITATION,
How and when a crime, 415, 416.

LAW,
Ignorance or mistake of law no defense, 87.

LAW OF NATIONS,
Offenses against, 475, 493.

LEGISLATURE,
See Statutes.

LEWDNESS,
As a nuisance, 401.
How and when a crime, 415, 416.

LIBEL,
On private persons, defined, 462.
What constitutes defamatory matter, 463.
Spoken words, 464.
Publication, 465.
Without, to circulate within, the state, 465, 486.
Truth no defense, 464.
Privileged communications, 466.
Malice, 467.
Other libels, 468.
Liability of principal for acts of agent, 130, 132, 465.

LIMITS,
See Jurisdiction.

LIVING IN ADULTERY,
What constitutes, 416.

LIVING IN FORNICATION,
What constitutes, 416.

LOCALITY,
See Jurisdiction.

LOST PROPERTY.
See Larceny.

LOUISIANA,
Common law governs as to crimes, 22.

LUCRI CAUSA,
Intent in larceny, 345.

LUNACY,
See Insanity.

M

MAIM,
See Mayhem.

MAINTENANCE,
Defined and explained, 432.

MALA IN SE AND MALA PROHIBITA,
Distinction, 18.
Homicide in doing act, 194, 229.

MALFEASANCE,
In office, 450.

MALICE,
An essential element in a crime, 55, 383.
Distinguished from intent, 49.
Not imputable to corporation, 86.
As ingredient of particular crimes, malicious mischief, 383.
Murder, 206 et seq.
Presumption of, 214.
Arson, 291.
Libel, 467.

MALICIOUS MISCHIEF,
Defined, 382.
Distinguished from larceny, 346, 383.
Property subject to, 383.
The malice, 383.
Justification for injury, 384.

[The figures refer to pages]

MANSLAUGHTER,
Defined, 218.
A felony, 218.
Voluntary, defined, 218.
Passion necessary, 218, 227 et seq.
Cooling time, 220, 228.
Provocation, 213, 214, 218 et seq.
Adequacy of, in general, 220, 221 et seq.
Assault and battery, 221.
Injuries to relatives or friends, 221 et seq.
Mutual combat, 228.
Unlawful attempt to arrest, 223.
Unlawful imprisonment, 222.
Wife's adultery, 224.
Seduction, 221.
Breaches of contract, 225.
Insulting and abusive words or gestures, 224, 225.
Insults to female relatives, 226.
Trespass on property, 225.
Question of fact, 225, 226.
Effect of drunkenness on question of provocation, 80.
Effect of mistake of fact, 225.
Distinguished from self-defense, 227.
Involuntary, defined, 229.
Unlawful act, 229.
Attempt to commit suicide, 231.
Assault and battery, 230, 231.
Immoderate correction of child, 231.
In committing abortion, 231.
In games, 230.
Negligence, in doing lawful act, 229, 232.
Failure to perform legal duty, 229, 234.
Contributory negligence, 238.
Principals and accessaries, 238.
Statutory degrees, 239.
Assault with intent to commit, 259.
See, also, Abortion; Homicide; Murder; Suicide.

MARRIED WOMEN,
See Husband and Wife.

MASTER AND SERVANT,
Command of master no defense, 101.
Assault by master on servant, 271.
Larceny by servants, 324.
Obtaining property from servant, 324, 333.
See Principal and Agent.

[The figures refer to pages]

MAYHEM,
Defined, 240.
What constitutes, 240.
Felony or misdemeanor, 240
When justifiable, 241.
Consent of person maimed, 2, 11.
Intent in, 241.

MEETING,
Disturbance of, 453.

MENTAL CAPACITY,
As element in crime, 61.
See Corporations; Drunkenness; Infancy; Insanity.

MENTAL ELEMENT,
In general, 48, 61.
See Criminal Intention; Malice; Motive; Will.

MERGER,
Of civil remedy, 9, note.
Of offenses, 45.

MINORS,
See Infancy.

MISCEGENATION,
Defined, 420.

MISCHIEF,
See Malicious Mischief.

MISCONDUCT IN OFFICE,
What constitutes, 450.
Extortion defined, 450.
Fraud and breach of trust, 450.
Nonfeasance, 451.
Oppression defined, 450.
Refusal to accept office, 451.

MISDEMEANOR,
Civil and criminal proceedings, 8.
What are, 42.
Distinguished from felonies, 42, 44.
Merger in felony, 45.
Solicitation to commit, 152.
See Felonies.

MISFORTUNE,
See Accident.

MISLAID PROPERTY,
See Larceny.

[The figures refer to pages]

MISPRISION,
Of felony, 440.
Of treason, 469, 472.

MISTAKE,
Of law, as ground of exemption from responsibility, 87.
Of fact, as ground of exemption from responsibility, 81, 90 et seq.
Overpayments by, larceny, 336.
Insane delusions, see Insanity.

MONOPOLIES,
Conspiracy, 159, 164, note.
Forestalling, regrating and engrossing, 473.

MORAL INSANITY,
See Insanity.

MORALITY,
As part of common law, 25.
Offenses against, see Adultery; Bigamy and Polygamy; Fornication; Illicit Cohabitation; Incest; Miscegenation; Nuisance.

MORALS,
See Public Morals.

MOTIVE,
Defined, 50.
Bad motive not punishable, 51.
Good motive no defense, 51.
When material, 52.

MUNICIPAL ORDINANCES,
Indictment under, as jeopardy, 500.
See Statutes.

MURDER,
Defined, 206.
Acts showing malice in law, 206 et seq.
Actual intention to kill, 206, 209.
A felony punishable by death, 207.
In committing another crime, 206, 211.
In resisting arrest, 206, 213.
In resisting attempt to suppress riot or affray, 207, 214.
Intention to inflict bodily injury, 206, 209.
In attempting suicide, 212.
In committing abortion, 212.
In omitting to act, 234.
Malice explained, 206 et seq.
Presumption of, 214.
Cruel and wanton acts, 209.
Statutory degrees, 217.
Drunkenness as affecting degree of crime, 80.

[The figures refer to pages]

MURDER—Continued,
Assault with intent to commit, 259.
See, also, Homicide; Manslaughter; Suicide.

MUTUAL COMBAT,
As a crime, 11.
As provocation for homicide, 222.

MUTUAL FAULT,
No defense, 2, 14.

N

NATIONS, LAW OF,
Offenses against, 475, 493.

NAVIGABLE WATERS,
Obstruction of, 402.

NECESSITY AND COMPULSION,
As ground of exemption from responsibility, 98, 99, 104, 471.
Coercion of wife by husband, 102 et seq.
Irresistible impulse from mental disease, 68, 77, 82.
Abortion to save life of mother, 430.
Negligence as affecting, 106.

NEGLIGENCE,
Of person injured, 14.
In homicide, 169, 193.
May supply criminal intent or malice, 59.
Insane delusion as result of negligence, 68.
Negligent ignorance of fact, 90, 91.
Involuntary manslaughter by, 232.
Causing battery, see Assaults.
Causing death, see Manslaughter.

NEUTRALITY,
Violation of, 476, 493.

NONFEASANCE,
In office, 451.

NUISANCE,
Defined, 398.
What acts constitute, 398 et seq.
Intent, 403.
Corporation may be punished for, 82, 83.
Liability of principal for acts of agent, 133.
Justification and prescription, 403.
Acts without, taking effect within, state, 486.

O

OBSCENE LANGUAGE,
As a nuisance, 401.

OBSCENE LIBELS,
Explained, 468.

OBSTRUCTING JUSTICE,
How and when a crime, 435.
See, also, Bribery; Compounding Crime; Embracery; Escape; Misprision of Felony; Perjury; Prison Breach; Rescue.

OBSTRUCTION,
Of highways and navigable waters, 402.

OFFICE AND OFFICER,
Refusal to accept, 451.
Embezzlement by public officer, 357, 450, 451.
See Misconduct in Office.

OHIO,
No common-law crimes, 37.

OMISSION,
Crime of, 16, 403.

ONCE IN JEOPARDY,
Explained, 497.

OPPRESSION,
By officer, 450.

OVERT ACT,
Essential, 54, 60, 138, 254.
Solicitation as overt act, 153.
In conspiracy, 154, 155.

P

PARENT AND CHILD,
Parental authority as justification, 98, 101.
Neglect of parent, manslaughter, 234.
Immoderate correction, as an assault and battery, 270.
Manslaughter, 231.
False imprisonment of child by parent, 279.

PARTIAL INSANITY,
See Insanity.

PARTIES TO CRIMES,
Classification, 109.
Effect of joining in criminal purpose, 108 et seq.
See Principals and Accessaries.

PASSION,
See Insanity; Manslaughter.

PASSPORT,
Violation of, 476.

PEACE,
Breach of, 453 et seq.

PENAL CODES,
In general, 37.

PENAL STATUTES, 17.

PERJURY,
Defined, 441.
The oath, 441.
Jurisdiction, 442.
The proceeding, 442.
Falsity of testimony, 444.
Intent, 444.
Materiality of testimony, 445.
By corporation, 84.
Subornation of, 441.

PERSON,
Offenses against, 166.

PETIT LARCENY,
See Larceny.

PETIT TREASON,
See Treason.

PIRACY,
Defined and explained, 475.
A felony, 475.

POLICE REGULATIONS,
Ignorance or mistake of fact, 93.

POLYGAMY,
See Bigamy and Polygamy.

POSSESSION,
See Embezzlement; Larceny.

POST OFFICE,
Offenses against, 473.

PRESENT ABILITY,
To commit crime, see Assaults; Attempts.

PRESUMPTION,
That consequences of act were intended, 52.
As to mental capacity of infant, 62.
Of sanity, 74.
That every one knows the law, 88, 391.

[The figures refer to pages]

PRESUMPTION—Continued,
Of wife's coercion by husband, 102 et seq.
Of malice, 214.

PREVENTION OF CRIME,
As justification of criminal act, 98.
See Homicide.

PRINCIPALS AND ACCESSARIES,
Classification, 109.
Distinction recognized in felonies only, 43, 109.
Principals in the first degree, defined, 110.
Acting through agent in another state, 111.
Acting through innocent agent, 110.
Punishment and procedure, 113.
Principals in second degree, defined, 112.
Constructive presence, 112.
Aiding and abetting, 113, 127.
Community of unlawful purpose, 115.
For what acts liable, 115 et seq.
Withdrawal, 117.
Punishment and procedure, 118.
Accessary before the fact, defined, 119.
For what acts answerable, 120.
Punishment and procedure, 122.
Repentance and withdrawal, 122.
Accessaries after the fact, defined, 124.
The assistance, 124.
Persons in family relation, 126.
Punishment and procedure, 126.
Use of terms "aider and abettor" and "accomplice," 127.
Liability of co-conspirators, 162.
In manslaughter, 238.
In rape, 251.
Abortion, woman not an accomplice, 430.
See, also, Conspiracy.

PRINCIPAL AND AGENT,
Principal's liability for agent's acts, 128.
Agent's liability for his own acts, 136.
Agent's act as evidence of authority, 130.
Negligence, 132.
Statutory offenses, 133.
Obtaining property from agent, 323, 333.

PRISON BREACH,
Defined and explained, 437, 438.

PRIVATE WRONGS,
See Torts.

[The figures refer to pages]

PROFANITY,
As a nuisance, 401.

PROPERTY,
Offenses against, 305 et seq.
Defense of, 188, 273.
See Larceny.

PROSTITUTION,
See Abduction; Adultery; Bigamy and Polygamy; Disorderly House; Fornication; Illicit Cohabitation; Incest; Lewdness; Miscegenation; Nuisance.

PROVOCATION,
In general, 107.
As exemption from criminal responsibility, 107.
Burden of proving, 215.
For homicide, see Manslaughter.

PUBLIC AUTHORITY,
As justification for criminal act, 98.

PUBLIC HEALTH,
See Nuisance.

PUBLIC JUSTICE,
Offenses against, 432.

PUBLIC MORALS,
See Adultery; Bigamy and Polygamy; Fornication; Illicit Cohabitation; Incest; Lewdness; Miscegenation; Nuisance.

PUBLIC PEACE,
Offenses against, 453 et seq.

PUBLIC POLICY,
As the ground of punishment, 2, 4, 5.

PUBLIC SAFETY,
See Nuisance.

PUNISHMENT,
Ground of, 1, 4, 5.
Punishability not an absolute test of crime, 16.

PUNITIVE DAMAGES,
Action for, civil not criminal, 16.

PURPOSE,
See Criminal Intent.

R

RAILROAD COMPANIES,
Criminal liability of, 82 et seq.

RAPE,
Defined, 242.
A felony, 242.

RAPE—Continued,
Essentials of the crime, 242 et seq.
Force, 243.
Consent, actual force, 11, 243, 245.
Consent obtained by intimidation, 242, 243, 247.
Woman incapable of consenting, 242, 245, 261, 277.
Carnal knowledge of children, 12, 242, 246, 261.
Fraud in obtaining, 247.
The act, penetration and emission, 244, 248, 250.
The woman, 250.
Who may commit, 251.
Distinguished from seduction, 427.
From adultery, 414.
From incest, 419.
Condonation of crime by woman, 9, 245.
Attempt to commit, 146, 147, 149, 151, 276.
Assault with intent to commit, 260, 261, 266.
Homicide in self-defense, 179.
Carnal knowledge of infant, 11, 246.
Of drunken woman, 245.
Of insane woman, 245.
Of sleeping woman, 245.
Of imbecile woman, 245.

REASONABLE DOUBT,
As to sanity, 74.

RECEIVING STOLEN GOODS,
At common law, 378.
Elements of the crime, 378.
Husband and wife, 380.
Character of goods as stolen, 378.
The receipt, 380.
Receiving from receiver, 379.
Character of possession, 380.
Ratification of receipt by agent, 380.
By one partner of receipt by the other, 381.
By husband of receipt by wife, 380.
Fraudulent intent necessary, 381.
Goods stolen in another state, 382, 490.
Receiving embezzled goods, 380.
Goods obtained by false pretense, 380.
Knowledge necessary, 381.

RECKLESSNESS,
See Negligence.

REGRATING,
Explained, 473.

RELIGIOUS BELIEF,
No defense, 50, 410.
See Adultery; Bigamy and Polygamy.

REPEAL,
Of common law by statute, 38.
See Statutes.

REPENTANCE,
Effect, 122.
See Abandonment.

RESCUE,
Defined and explained, 437, 438.
Homicide to prevent, 174, 176.

RETREAT,
See Assault; Homicide.

RETROSPECTIVE LAWS,
Ex post facto laws, 31.

RETURN,
Of stolen property, 342.

RIOT,
Defined and explained, 456.
Suppression of, as justification for criminal act, 98.
Homicide to suppress, 177.
Homicide by rioters, 214.

ROBBERY,
Defined, 373.
Distinguished from larceny, 373.
A felony, 373.
Elements of the crime, 373.
Property subject to, 373.
Ownership of property, 376, 377.
Manner of taking, 374.
Consent to taking, 12, 276, 377.
Intent, 373, 376.
Threats, 375, 377.
Violence or intimidation, 374, 375.
Assault with intent to commit, 259.
See, also, Piracy; Receiving Stolen Goods.

ROUT,
Defined and explained, 456.

S

SAFETY,
See Public Safety.

SEDITIOUS LIBELS,
Explained, 468.

[The figures refer to pages]

SEDUCTION,
Defined, 423.
Distinguished from rape, 427.
The seduction, promises and persuasion, 425.
Condition and character of female, 423.
Marriage of the parties, 428.
See, also, Abduction.

SELF-DEFENSE,
See Assaults; Homicide.

SERVANT,
See Larceny; Master and Servant; Principal and Agent.

SETTLEMENT,
With person injured by crime, 2, 9.
By embezzler, no defense, 359.

SHIPBOARD,
Offenses on, 480.

SIMPLE LARCENY,
See Larceny.

SLANDER,
See Libel.

SODOMY,
Defined, 420.
Essentials, 421.
Felony or misdemeanor, 422.

SOLICITATION,
To commit crime, 152.

SPECIFIC INTENT,
See Criminal Intention.

SPRING GUNS,
Right to set, 399.

STATES,
Powers of legislature as to crimes, 28.
See Jurisdiction.

STATUTES,
Effect of repeal as to prior offenses, 8.
As revival of former law, 36.
Power of state legislatures, 27.
Statutory crimes, in general, 27.
Powers of congress, 28.
Restrictions of federal constitution, 29.
Powers of territorial legislature, 30.
Ex post facto laws, 31.
Construction of, 34.
Common law in connection with, 35, 37.

[The figures refer to pages]

STATUTES—Continued,
As repeal of common law, 38.
Penal codes, 37.
Municipal ordinances, 38.

STEALING,
See Larceny.

STRIKES,
Conspiracy, 159, 163, note.

SUBORNATION OF PERJURY,
See Perjury.

SUICIDE,
As a crime, 215.
Homicide in attempting, murder, 231.
Manslaughter, 231.

SUNDAY,
Disturbance of public rest, 400.

T

TEACHER,
Authority of, 271.

TERRITORIAL LIMITS,
See Jurisdiction.

TERRITORIES,
Powers of territorial legislature, 30.

THEFT,
See Larceny.

THREAT,
In false imprisonment, 278.
In kidnapping, 280.
See Duress.

TORTS,
Distinguished from crimes, 6, 9, 15.

TRADES UNIONS,
Conspiracy, 159, 164, note.

TRAP,
Laying trap to catch offender, 117.
See Entrapment.

TREASON,
Defined and explained, 469.
What constitutes, 41, 469.
All concerned are principals, 109.
Misprision, 469.
Petit, 41, 469.
Punishment, 471.

[The figures refer to pages]

TRESPASS,
See Forcible Entry and Detainer; Larceny; Malicious Mischief.

TRIFLING OFFENSES,
Not noticed, 5.

TRUSTS,
Conspiracy, 159, 163, note.

U

UNIONS,
Conspiracy, 159, 163, note.

UNITED STATES,
No common-law crimes against, 19, 26.
Powers of congress as to crimes, 27.
Crimes against, 469, 472.
See Jurisdiction.

UNLAWFUL ASSEMBLY,
Defined and explained, 455.

UTTERING,
Of forged instrument, see Forgery.

V

VOLENTI NON FIT INJURIA,
Application of maxim, 10.

VOLUNTARY,
See Will.

VOLUNTARY MANSLAUGHTER,
See Manslaughter.

W

WANTON ACT,
Murder, 209.

WIFE,
See Husband and Wife.

WILL,
Exercise of will essential, 48.
Irresistible impulse from insanity, 65, 68.

WEST PUBLISHING CO., PRINTERS, ST. PAUL, MINN.